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VIRGINIA APPEALS

The Earliest Report of All Current Decisions of The Supreme Court of Appeals

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JUDGES.

HON. JOSEPH L. KELLY, President.

HON. ROBERT R. PRENTIS. HON. MARTIN P. BURKS.

HON. FREDERICK WILMER SIMS. *HON. JESSE F. WEST.

*Elected to succeed Hon. Edward W. Saunders, died December 16, 1921. Judge West was seated February 1, 1922.

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VIRGINIA APPEALS

BRAGG *v.* COMMONWEALTH.

(*Wytheville, June 15, 1922.*)

1. INTOXICATING LIQUORS—Sale—Indictment—Demurrer—Two Offenses—Proof of Intoxicating Character of Liquor—Evidence—Men of Intemperate Habits—Instructions—Evidence—Sale of Flavoring Extract—"Intoxication" Defined—Prohibition Law—Appeal and Error—Code, secs. 4958, 6368.

Error to Circuit Court of Alleghany county.

Affirmed.

Geo. A. Revercomb and *R. C. Stokes,* for the plaintiff in error.

Attorney General Jno. R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile,* for the Commonwealth.

WEST, J.:

T. H. Bragg, the plaintiff in error, hereafter called the accused, was convicted by a jury in the Circuit Court of Alleghany county of a violation of the prohibition law, and the case is here upon a writ of error to the judgment of that court.

The offense charged in the indictment is, that T. H. Bragg "did unlawfully sell ardent spirits, to-wit, flavoring extracts for beverage purposes."

The accused relies on six assignments of error to the rulings of the trial court.

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The first assignment relates to the action of the court in overruling the demurrer to the indictment. It is claimed that the indictment charges the accused with two separate and distinct offenses—first, selling ardent spirits, and, second, selling flavoring extracts for beverage purposes—and that this cannot be done in one indictment.

The indictment, in our view, charges only one offense, to-wit, the unlawful sale of ardent spirits, the words, "to-wit, flavoring extracts for beverage purposes," being simply descriptive of the kind of liquid sold. However, it is immaterial whether there be one or two offenses charged, as this court has held that under an indictment for a violation of the prohibition law two offenses may be charged in one count of the indictment. *Pine* v. *Commonwealth*, 121 Va. 812, 14 Va. App. 575.

This assignment is without merit.

The second assignment relates to the action of the court in overruling the motion of the accused to strike out that part of the bill of particulars which alleges "the said Dickson and Burnett Morris being men of intemperate habit."

The burden was on the Commonwealth to prove that the liquid sold was intoxicating, either by analysis thereof or by facts and circumstances which would satisfy the jury beyond a reasonable doubt that it would produce intoxication. On the latter question, the Commonwealth had the right, with the words complained of stricken from the bill of particulars, to prove that the parties named were men of intemperate habits, as tending to show that the extract sold contained ardent spirits and would produce intoxication. since people of this class are usually attracted by the sale of liquids which will intoxicate.

This assignment is likewise without merit.

The third and fourth assignments complain of the action of the trial court in permitting John Dickson and Burnett Morris to testify that they were men of intemperate habits.

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For the reasons given in passing upon the second assignment, *supra*, there is no merit in these assignments.

The fifth assignment is to the action of the court in granting an instruction which told the jury "they should find the defendant guilty if the jury believed beyond a reasonable doubt, from the evidence, that the defendant sold flavoring extracts for beverage purposes, either knowing or having reasonable cause to believe that they would be so used, which flavoring extracts would produce intoxication."

The ground of the accused's objection is that there is no evidence upon which to base this instruction. In this view, we cannot concur, for reasons which will appear when we discuss the sixth assignment of error.

The sixth assignment is that the court erred in refusing to set aside the verdict of the jury as contrary to the law and the evidence.

While it is true that the words "ardent spirits," according to their general acceptation, designate a liquid containing alcohol, yet it must be borne in mind that the prohibition act itself construes these words, and among the liquids defined by section 1 of the statute as "ardent spirits" are "all liquids, mixtures or preparations, whether patented or otherwise, which will produce intoxication." Thus, the sale of any liquid which will produce intoxication is prohibited by law. Section 49 of the act also gives us the meaning of the word "intoxication," as used in the act, as follows: "Any person who has drunk enough ardent spirits to so affect his manner, disposition, speech, muscular movement, general appearance or behavior, as to be apparent to observation, shall be deemed for the purposes of this act intoxicated." Section 58 further provides that "This entire act shall be deemed an exercise of the police power of the State for the protection of the State, for the protection of the public health, peace and morals, and the prevention of the sale and use of ardent spirits, and all of its provisions

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shall be liberally construed to effect these objects." *Christian* v. *Com.*, 132 Va. —, 25 Va. App. 563, 111 S. E. 130.

The words "intoxicated" and "drunk" are synonymous. Words and Phrases, Vol. 4, p. 3734.

Black's Law Dictionary defines "intoxication" as the mental and physical condition produced by drinking excessive quantities of alcoholic liquors.

It will be observed that in Virginia the foregoing definition of "intoxication" is now inapplicable in prosecutions under the prohibition statute, since under its provisions, if you sell a person enough of any liquid to affect his manner, disposition, speech, general appearance or behavior, so as to be apparent to observation, you are guilty of selling him a liquid which will produce intoxication.

The facts appearing in evidence are substantially as here stated.

The accused is a merchant and postmaster at Mallow, in Alleghany county, about four miles from Covington. The concoction which the witnesses for the Commonwealth purchased from him was labeled "Noah's Imitation Blackberry Flavoring," which he purchased for $1.00 and sold for $2.00 per bottle. John Dickson, a witness for the Commonwealth, bought several bottles within six weeks prior to the trial. The first time he purchased it he took it home to his mother as a flavoring extract, but she refused to use it, and he drank it, and also drank all that he purchased on subsequent occasions. Dickson was a man of intemperate habits and had purchased it, opened the bottle and tasted it, in the store of the accused. The accused had seen him several times when he was in an intoxicated condition. He testified further that you "feel it, when you drink right smart," and "you could drink right smart of it and it would make you feel pretty good."

Burnett Morris, called as an adverse witness for the Commonwealth, testified that he had bought "Noah's Imitation Blackberry Flavoring" from the accused on various occa-

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sions, both for drinking and flavoring purposes, and when he bought it for flavoring purposes he would drink some of it, and had drunk it in the store of the accused, but could not say the accused saw him. He said he had drunk enough of it to "feel it," and "you can't drink that without diluting it. You have to have some water." He admitted that he was a man of intemperate habits and testified that it was generally known that John Dickson got on "protracted sprees."

J. L. Morris, a witness for the Commonwealth, who lived sixty or seventy yards from Bragg's store, testified that both Dickson and Morris were men of intemperate habits, and it was a notorious fact that Dickson had been of such habits for years. This witness further testified that various persons would go to the store of the accused and come away, from their appearance and demeanor, under the influence of intoxicants, but he could not say that they secured them from the accused. Many of these men were unknown to him, although he had lived at Mallow for twenty years. Some would come on foot and some in cars, sometimes on Sunday and sometimes in the week. Ed. Cook and Frank Cook, who "liked their toddy" and lived in Covington, were there frequently on Sunday.

Harry Vowels testified that he saw Dickson in the store of, and in the presence of the accused, in an intoxicated condition, and had seen him drinking in the store.

The accused, testifying in his own behalf, admitted that he knew Dickson and Morris were men of intemperate habits and that he sold them flavoring extract, but claimed he sold it not to be drunk, but to be used for cooking purposes, and that he purchased "Noah's Imitation Blackberry Flavoring" as a flavoring extract and sold it as a flavoring extract. He admitted that he knew it contained alcohol, but did not know whether it would "fly to the head or not." He cautioned Dickson and Morris when they bought it, saying to them: "This is flavoring extract. If you want it for

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that, it will be all right, but if you want it for other purposes—beverage—set it back." He admitted that Dickson had been in his place drinking, and that he had seen him in other places drinking. Three other witnesses testified that the accused was a man of good character and bore a good reputation as a law-abiding citizen.

The rule governing this court in granting a new trial on the ground that the verdict is contrary to the law and evidence has been well stated by the court in *Grayson's Case,* 6 Gratt. (47 Va.) 712, where it is said: "Where some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the court, if upon the jury, would have given a different verdict. To warrant a new trial in such cases, the evidence should be plainly insufficient to warrant the finding of the jury." And this restriction applies *a fortiori* to an appellate court. For in the appellate court there is superadded to the weight which must always be given the verdict of the jury fairly rendered, that of the opinion of the judge who presided at the trial, which is always entitled to peculiar respect upon the question of a new trial. *Blosser* v. *Harshbarger,* 21 Gratt. (62 Va.) 216; *Brugh* v. *Shanks,* 5 Leigh (32 Va.) 598.

In addition, the statute, section 6363 of the Code, now provides that, where a party excepts to the action of the court in refusing a new trial, where the evidence, as in the instant case (and not the facts), is certified, "the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong, or without evidence to support it." The evidence presents a case, the determination of which was for the jury.

Under the law and the evidence, we find no reversible error, and the judgment complained of will be affirmed.

Affirmed.

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BLANKENSHIP *v.* COMMONWEALTH.

(*Wytheville, June 15, 1922.*)

1. LARCENY—Goods and Chattels—Dog—Personal Property—Payment of Tax—Evidence—Code, secs. 2324, 4440, 4445.

Error to Corporation Court of city of Roanoke.

Reversed.

John G. Challice, for the plaintiff in error.

Attorney General Jno. R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile,* for the Commonwealth.

KELLY, P.:

Herman Blankenship was convicted in the Corporation Court of the city of Roanoke and sentenced to the penitentiary for one year upon an indictment charging him with the larceny of two dogs valued at $100 each.

The prosecution was instituted under section 4440 of the Code, which provides that "if any person commit simple larceny, not from the person of another, of goods and chattels he shall be, if they are of the value of fifty dollars or more, deemed guilty of grand larceny, and be confined in the penitentiary not less than one nor more than ten years."

The question which presents itself at the outset is whether dogs are such "goods and chattels" as to be the subject of larceny in Virginia. In Minor's Synopsis of Criminal Law, page 106, the learned author says, with respect to dogs, cats, parrots, etc.: "These have no such value as to be *subjects of larceny,* apparently from tenderness to the life and liberty of the citizen, but a *civil action* may be maintained for them. An exception, however, is made by the statute in the case of dogs in Richmond and Manchester and in the county of Henrico, and also in the case of all dogs which are listed for taxation, and wear a *tag.* (V. C. 1887, ch. 181, sec. 3711; 2 Bl. Com. 393.) And, *perhaps,*

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at common law it may be so when animals of this description have a pecuniary value, apart from the *whim or caprice* of the owner, as in case of persons who deal in them as articles of merchandise, or of a trained shepherd's dog, and the like, and they may be the subjects of larceny."

In 17 R. C. L., sec. 35, p. 32, it is said that the reasoning of the common law rule, however satisfactory it may have once been, cannot be regarded as applicable in this day, and ought to yield to common sense; and the text adds: "Accordingly, the rule of the early common law has not been generally followed, and at the present time dogs are usually to be considered the subject of larceny. The early common law rule in this respect was very technical and was without any sound basis to rest on, and while the strict common law definition of goods and chattels would not include dogs, the courts have declined to adopt that rule, but have held that the common understanding of the meaning of such words would be resorted to, and that in such view dogs are clearly chattels."

We have not examined the authorities cited in support of the last above quotation, but would be strongly inclined to follow the conclusion therein announced if we could regard the question as an open one in Virginia, and if we did not feel that such a concluson would contravene a just and reasonable policy in this State, requiring all persons who wish to treat their dogs as personal property to have them listed for taxation.

There was evidence for the Commonwealth that the dogs in question were worth the amount alleged in the indictment, and evidence for the defendant that they had no commercial value whatever. The verdict of the jury settled this conflict against the defendant; but there was no proof that the dogs had been assessed with a license tax, and that the tax thereon was not delinquent. Such proof was, in our opinion, essential to the defendant's conviction.

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Section 2324 of the Code is as follows: "All dogs in this State which have been assessed with a license tax and upon which the said license is not delinquent, shall be deemed personal property, and may be the subject of larceny and malicious or unlawful trespass."

The only other statutory provision bearing upon the larceny of dogs is section 4445 of the Code, which is as follows: "All dogs in the cities of Richmond, Petersburg and Alexandria, and in the county of Henrico, whether listed for taxes or not, shall be deemed personal property, and may be the subject of *petit larceny* and malicious or unlawful trespass." (Italics added.)

The latter section has no application to grand larceny, and, moreover, does not embrace the territory in which this case arose, and it seems clear, therefore, that under the law of this State the Commonwealth failed to sustain the charge against the defendant by sufficient evidence. The generally accepted doctrine of the common law, clearly recognized by our statutes, was that dogs were not the subject of larceny; and this case is not shown to be within the statutory exceptions to that doctrine.

In 2 Whart. Cr. Law (11th ed.), sec. 1107, it is said: "But as to all other animals which do not serve for food, such as dogs and ferrets, though tame and salable, or other creatures kept for whim or pleasure, stealing these does not amount to larceny at common law. It is otherwise, however, when they are taxed." See also to the same effect *Sentell* v. *N. O. & C. R. Co.*, 166 U. S. 696, 701, 41 L. Ed. 1169, 1170; Davis' Cr. Law 185; 3 Chitty's Cr. Law (3d Am. ed.) 934b; 18 Am. & Eng. Ency. L. (2nd ed.) 514; Idem, vol. 2, p. 347; 25 Cyc. 18.

Maclin's Case, 3 Leigh (30 Va.) 809, is in point. That was a case involving a criminal prosecution for killing dogs under section 1, chapter 34, Acts 1822-3, making it unlawful for any person to knowingly and willfully destroy or injure "property, real or personal, belonging to another,"

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and, therefore, substantially the same question was there involved as we have here. The court in that case said: "By the common law, property in dogs and other inferior animals is not such as that larceny can be committed by stealing them, though the possessor has a base property in them and may maintain a civil action for injuries done to them, and in a penal act like the one now under consideration, the word 'property' standing alone ought to be considered to mean full and complete property, such as by the common law may be protected by a public prosecution for the larceny thereof."

The decision in *Maclin's Case,* with a just apology to the dog of Judges Moncure and Joynes, was reaffirmed in *Davis' Case,* 17 Gratt. (58 Va.) 617, upon the principle of *stare decisis,* re-enforced by the long subsequent acquiescence of the Virginia legislature. The judgment in that case was as follows: "The court is of opinion, for reasons stated in writing and filed with the record, that on the principle of the decision in *Maclin's Case,* 3 Leigh 809, it is not an indictable offense to kill a dog, though it may be the ground of a civil action for damages; and, whatever doubt may exist as to the correctness of that decision, yet as it has never been overruled, but, on the contrary, has been tacitly sanctioned by the legislature, by embodying in the act of March 14, 1848, called the 'Criminal Code,' and in the Code of 1849, without substantial change, the statute which was construed in that case, being the same in effect, so far as relates to this case, with the 53d section of chapter 192 of the Code of 1860, on which the prosecution in this case was founded, the court is of opinion that the said decision ought now to be regarded as a binding authority."

In a note found in 10 Va. Law Reg., p. 460, the Virginia decisions and statutory provisions upon this subject are discussed, and the following manifestly correct conclusion is announced: "The status of the law in Virginia then

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seems to be that in dogs not listed for taxes, or upon which the license tax is delinquent, there can be only a qualified or base property, and they are not subjects of larceny, but the owner may maintain a civil action for injuries done to them. But dogs that are listed, and upon which there are no delinquent taxes, constitute property in the ordinary sense, just as other domestic animals do."

It may be in order to observe that the act of May 9, 1903 (Acts 1902-3-4, p. 312), which, so far as pertinent here, has been supplanted by section 2324 of the Code, expressly provided that *no other* dogs than those assessed and not delinquent could be the subject of larceny, and this express restriction is not found in the present statute. We do not regard this omission, however, as at all controlling in construing the present law. The whole subject is dealt with by statute, and the only exception to the general rule is found in section 4445 of the Code, *supra*.

For the reasons stated by this court in the *Davis Case, supra,* as well as because we wish to support the plain policy of the legislature in this respect, we feel constrained to hold that before the Commonwealth can sustain a conviction in a case like this, it must show that the dogs had been assessed with a license tax which was not delinquent at the time of the alleged larceny.

It is proper to say that the question herein discussed, and upon which our decision rests, does not appear to have been raised in any way at the trial, and has not been raised by counsel in this court. The question, however, goes to the substance of the crime charged, and we do not feel warranted in sustaining the conviction upon the present state of the record.

That there may be no undue concern or sympathy for the two dogs and their owner, it is here stated that they were promptly recovered by the latter and are back at home.

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The judgment will be reversed, and the cause remanded for a new trial, if the attorney for the Commonwealth shall so advise.

Reversed.

CREASY *v.* COMMONWEALTH.

(*Wytheville, June 15, 1922.*)

1. INTOXICATING LIQUORS—Transporting Whiskey—Evidence.

Error to Circuit Court of Bedford county.

Affirmed.

Nelson Sale, for the plaintiff in error.

Attorney General John R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile,* for the Commonwealth.

SIMS, J.:

The verdict of the jury found the accused guilty of unlawfully transporting whiskey and fixed his punishment at four months in jail and a fine of two hundred dollars. The judgment under review was entered accordingly.

There is but one assignment of error which involves the single question of whether there was sufficient evidence to support the verdict of the jury.

There was direct testimony for the Commonwealth to the following effect:

Ferguson, a witness for the Commonwealth, testified that he saw the accused, about eight o'clock on Saturday morning, July 2nd, going along the public road, about fifty yards from his father's house, carrying something in a sack or bag which he seemed to be holding by a handle, apparently a can. That the accused, after going along the road a short distance, went, through a pair of drawbars in the fence, into some bushes, about twenty-five yards from the road,

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in a field belonging to the mother of the accused, on the opposite side of the road from the home of the father and mother of the accused, where the accused lived. That the accused came out of the bushes with nothing in his hands. That, as witness passed the Creasy house, the mother of the accused was coming out of her door and came to the mail box. That witness went immediately to Turner's store, a distance of about a half a mile, and reported what he had seen to a deputy sheriff, named Nance.

Nance, who was also a witness for the Commonwealth, testified that when he was on his way to the store that morning, he, himself, saw the accused, about 7 o'clock, in the road, on a bank, about fifty yards from where the can was afterwards found, and that "something after eight o'clock" witness saw the accused coming out of that field where the can was afterwards found. That about ten o'clock witness saw the accused crossing the road, going from the house to the cornfield to work. That about 12:30 o'clock witness and some other officers went and made a search in the bushes, into which Ferguson had told witness he saw the accused carry something in a bag or sack, apparently a can, about eight o'clock, as aforesaid, and that witness and those with him found the can exhibited on the trial, which was a square tin can, holding five gallons, with a wire handle on top. That they found broken pieces of bushes lying on top of the can, one of them a bush freshly broken off. That when found, the can was full of whiskey. That they found no sack or bag in the bushes. That they thereupon came to town and got a warrant for the arrest of the accused and went back to serve it about 4:30 or five o'clock. That when they got close to the place where the can was found, the father of the accused, a brother of the accused and the accused were seen coming from the cornfield, in which they had been working, towards the house. That the father came directly up the path towards the house. That the accused and his brother went down a bottom to

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the line fence next to a neighboring piece of land and then came up towards the place where the can had been found, and when they got within about twenty steps of the place where the can had been found the officers stopped the accused and put him under arrest. Whereupon, the accused denied that he knew anything about the can or that it was his. Another witness for the Commonwealth—one of the officers—testified that bushes were over the can when they found it, some dried and two green ones which had not withered. That there was a hedge-row of bushes along the fence, between the road and the place at which the can was found, and that there were several places in the hedge where the bushes had been broken, one of those places being opposite the location of the can.

The father of the accused, a witness for the defense, testified that he had some cattle in the field where the can was found, and that as the fence next to his neighbor was not very good he told the accused and his brother, as they all quit work to go to the house, to walk down the bottom to the line fence and see whether any of the cattle had gotten over on his neighbor's corn. That he knew nothing about the can or about the whiskey being there.

The brother of the accused, also a witness for the defense, gave the same explanation that the father did of the coming of the accused and his brother around by the place where the whiskey was, on quitting work, instead of directly home.

The mother of the accused, likewise a witness for the defense, testified that the accused started to work about eight o'clock on the morning of July 2nd. That she walked with him to the mail box, which was directly in front of the house. That when they got to the mail box, the mail not having come, she walked along the road fifteen or twenty steps with him and then went back to the mail box. That the accused had nothing whatever in his hands when he left the witness, going down the road, and that he was in her

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sight from that time until he went through the drawbars to go into the cornfield. That it was after she went back to the mail box that the witness for the Commonwealth, Ferguson, came by.

The accused testified in his own behalf and stated that he started to his work about eight o'clock on the day in question. That his mother walked with him to the mail box and a few steps beyond. That he was carrying nothing whatever in his hands. That he went down the road until he came to the drawbars and got through over in the field to go to the corn field. That he saw Ferguson, the witness for the Commonwealth, coming down the road and could not imagine why Ferguson claimed that witness had anything in his hand whatever. That if Ferguson was telling the truth about saying he thought witness had something in his hand, the only thing he could have seen was that when witness got through the drawbars he took off his hat in order to get through. That he knew nothing about the can that was found there, or of any liquor being put there. He also gave the same explanation which his father and brother gave of his not coming directly home from the corn field when they quit work that day.

There was also testimony for the Commonwealth, which was not controverted or explained by the accused, or his father, or mother, that when the officers came in the afternoon and were at a point within fifteen steps of the place where the can had been previously found by them, the officers were ordered off the premises by the father and also by the mother of the accused.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The sole question presented for our decision by the assignments of error is the following:

1. Was there sufficient evidence before the jury to support the verdict?

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This question must be answered in the affirmative.

The case turns upon the question of the credibility of Ferguson's testimony, as against that of the accused and his witnesses. The verdict of the jury settled that question.

Therefore, taking the testimony of Ferguson to be true, we find on comparing it with the testimony of the accused and his mother that certainly both of the latter must have given a false account of the conduct of the accused at the time Ferguson saw him with something in his hand in a sack or bag, which had the appearance of the can of whiskey afterwards found. The testimony of Ferguson as to what he saw is absolutely irreconcilable with that of the accused and his mother. Both cannot be true. In addition to this false swearing of and for the accused, we have the evidence of the fact, unexplained, that the father and mother both ordered the officers off the premises when they saw them getting near the place at which the whiskey had been concealed. Further, there was the circumstantial evidence tending to show that the place of concealment of the liquor was not new, but one which had been used some time, as evidenced by the appearance of the broken bushes covering the can. The nearness of the place to the residence rendered it extremely improbable that it could have been so used for such a length of time as the circumstantial evidence indicated that it had been used without some member of the family knowing of it and being able to account for such use in some way. This consideration tended greatly to discredit the truth of the testimony not only of the accused and his mother, but also that of the father and brother, when they testified to absolute ignorance of such use. Added to this, as identifying the accused as the person who carried the can of whiskey to the place where it was found, was the newly broken pieces of bushes on top of the can, the place from whence the evidence indicated they came, and the direct testimony of Ferguson that he saw the accused go into the bushes, in the locality where the whiskey was found,

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with what appeared to be such a can as that, in a bag or sack carried by the handle of the can in his hand, and that he saw him come out of those bushes without anything in his hand; and the testimony of Nance that he saw the accused come out of that field "something" after that, and about ten o'clock saw the accused crossing the road, going from the residence to the cornfield to work. The accused may well have taken the sack or bag to the residence on the latter occasion. All this, coupled with the consideration that the accused and his mother, at least, if not the father and brother, gave a false account of the conduct of the accused, if the Ferguson testimony is to be believed (which, as the jury believed it, we must believe to have been true), we must hold that there was ample evidence to support the verdict of the jury.

The case will, therefore, be affirmed.

Affirmed.

CAMPBELL COUNTY *v.* HOWARD AND LEE.

(*Wytheville, June 15, 1922.*)

1. ACTIONS—Services Rendered—Amount of Recovery—*Quantum Valebat; Quantum Meruit*—Implied Promise to Pay—Attorneys at Law—Instructions.
2. IDEM—Instructions—Harmless Error—Sufficiency of Evidence to Sustain Verdict.
3. IDEM—Instructions—Contracts—Services Rendered—Measure of Recovery—Harmless Error.
4. IDEM—Contracts—Services—Instructions—Conflict—Harmless Error.
5. IDEM—Claim Against County—Services Rendered—Account Verified by Affidavit—Jurisdiction—Code, secs. 2759, 2763.
6. IDEM—Contracts—Services Rendered—Contingent Fee — Misappropriation of County Funds—Instructions.
7. IDEM—Contracts—Employment of Attorneys by County—Instructions—Code, sec. 2728.
8. IDEM—Services Rendered by Attorneys for County—Implied Promise to Pay—Lobbying—Evidence—Code, sec. 4499.

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9. IDEM—Services Rendered—Acceptance of Part of Amount Claimed —Accord and Satisfaction—Evidence—Code, sec. 5765.

Error to Circuit Court of Campbell county.

Affirmed.

A. H. Light and *Jno. G. Haythe,* for the plaintiff in error.
Kemp & Barksdale, for the defendants in error.

This case involves a claim of the defendants in error, Messrs. Howard and Lee, attorneys at law (hereinafter designated attorneys, or by their individual names), against the plaintiff in error, the county of Campbell (hereinafter designated the county), for the value of personal prefessional services rendered by the attorneys for the county, under a contract of employment which was silent as to the amount of the compensation to be paid for such services, under which contract the attorneys claimed, upon the issues joined on the trial of the case in the court below, that they were entitled to recover at least the sum of $3,333.34 as the value of such services, upon a *quantum meruit,* or upon a *quantum valebat* basis.

The case arose in the court below upon an appeal of the attorneys from an order of the board of supervisors of the county refusing to allow them any compensation for such services. The result of the trial in the lower court was a verdict and judgment in favor of the attorneys against the county for the sum of $2,000.00, and the county alleges error.

The attorneys did not file with their account, as presented to the board of supervisors, any affidavit, so as to comply with the requirement of the statute (Code, sec. 2759), which is as follows: "Where no specific fees are allowed by law, the time actually and necessarily devoted to the performance of any service charged in such account shall be verified by affidavit to be filed therewith." But the claim

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was not disallowed by the board of supervisors because of the lack of such affidavit; and upon the trial in the circuit court, under the statute on the subject (Code, sec. 2763), testimony under oath was introduced in evidence, showing the time actually and necessarily devoted to the performance of the services charged in the account.

The record discloses much confusion in the trial of the case in the circuit court, some of which is reflected in the briefs and oral argument on the appeal, upon the subject of whether the right of recovery of the attorneys is based or rests upon one or the other of two different contracts, which will be hereinafter designated the first and second contracts, respectively, both of which were between the county and the attorneys.

The first contract was a special contract, evidenced by the resolution of the board of supervisors of the county, adopted on October 20, 1919, which is as follows:

"Resolved, by the board of supervisors, That A. H. Light, Jno. L. Lee and Volney E. Howard have been and are hereby employed to represent the county of Campbell and its subdivisions and to defend their interests in the effort by the city of Lynchburg, now on foot, to extend the limits of said city by taking into its limits a part of the territory of Campbell county, said service by said attorneys to be rendered before the council of said city and its committee having in hand the proposed extension and in the court proceedings.

"It has been, and is now, agreed that the compensation of said attorneys to be paid by the county of Campbell shall be (1) the sum of three thousand dollars certain fee; and (2) after the committee of said council shall have made to the council its report of the exact boundaries recommended by it to be taken into said city limits, out of the territory of this county, he said attorneys shall have and be paid by this county an additional contingent fee of one-third of all taxes saved to the county and its subdivisions within the said boundary for the year first after the line is settled, and

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the contingent fee in no event to exceed five thousand dollars."

It will be noted that A. H. Light, the Commonwealth's attorney of the county, was one of the parties to this contract.

The second contract was not an express contract at all, but merely a promise which the law implies on the part of the county to pay the attorneys—Lee and Howard—the reasonable value of their personal services which were lawfully rendered in the employment of them by the county in the matter of "having an act passed by the General Assembly of Virginia amending the annexation laws of the State"; the fact of such employment being evidenced by the resolution of the said board adopted May 3, 1920, which is as follows:

"Virginia: At a meeting of the board of supervisors of Campbell county, held on the third day of May, 1920.

"An account amounting to $635.66 was this day presented to the board by John L. Lee and Volney E. Howard, *counsel for this county*, in defending the annexation suit proposed to be brought by the city of Lynchburg, said account being for expenses, etc., *incurred by said attorneys* in preparing defense in this suit, and *for having an act passed by the General Assembly of Virginia, amending the annexation laws of the State*, which said account is ordered to be paid, with the understanding that the amount thereof shall be deducted from the fee of said attorneys for defending the aforesaid suit." (Italics supplied.)

The account filed before the board of supervisors was in favor of Mr. Light, as well as of Messrs. Lee and Howard, and was as follows:

"The county of Campbell:

To A. H. Light, Jno. L. Lee and Volney E. Howard.

"To services rendered by the county of Campbell and its subdivisions in opposing and defeating the efforts of the city

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of Lynchburg to extend the limits of said city by taking into its limits a part of the territory of Campbell, under contract with the board of supervisors of said county for said services:

"The certain fee agreed $3,000.00
The contingent fee, and due..... 5,000.00

$8,000.00"

But in the proceeding before the circuit court the attorneys, Lee and Howard, took the positions shown by the bill of particulars of their claim as asserted on the trial of the appeal from the board of supervisors, namely:

"1. That said John L. Lee and Volney E. Howard and A. H. Light were employed by the board of supervisors of Campbell county, Va., as attorneys in, to-wit, October, 1919, to represent said county and its political subdivisions in endeavoring to defeat either entirely, or so far as could be done, the effort of the city of Lynchburg to annex a part of the territory of the county of Campbell, Va., and which territory yielded annually many thousands of dollars in taxes and revenues to said county.

"2. Thereafter, the said attorneys, especially the said John L. Lee and Volney E. Howard, rendered services under said contract of employment in preparing for the defense of, and resistance to, the contemplated annexation proceedings, and also, in connection therewith, rendered other services not expressly provided for in said contract, but which were advantageous and valuable to said county in defeating said annexation proceeding, and especially highly advantageous to said county in any future attempts to annex, or take from it, any part of its territory—and all of which was done with the knowledge, assent, approval and ratification of said county, and its officers, and which last-named services, not expressly provided for in said contract, were of the value of, to-wit, $8.000.00, so that said

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attorneys deserved to have from said county the sum of, to-wit, $8,000.00.

"3. In, to-wit, the fall of the year 1920, said county paid to said three attorneys, severally, the sum of $1,000.00 each in payment of the certain fee of $3,000.00 specially provided for in the contract of employment. The said A. H. Light, with the assent of said county, accepted the said sum of $1,000.00 so paid to him in full discharge of any further liability of said county to him for his services and renounced any further claim to compensation for his services. The said John L. Lee and Volney E. Howard, severally, accepted said sum of $1,000.00 each in payment of the aforesaid certain fee, but claimed, and have continued to, and do now claim, their two-thirds interest in the contingent fee mentioned in said contract for services rendered by them and expressly provided for therein; or, in any event, for their services rendered outside of the express contract and which were rendered with the assent, approval and ratification of said county and its officers, and said John L. Lee and Volney E. Howard claim, on a *quantum meruit*, they deserve to have and receive from said county for said last-mentioned services at least, to-wit, $3,333.34.

"4. The said John L. Lee and Volney E. Howard, acting under said contract of employment, expended extensive time and much labor in the preparation for the contemplated legal fight in the proposed annexation proceedings. In their study of the laws in this connection, it developed that if the county should fail in the court proceedings in only partially defeating the proposed annexation, the county would only be compensated by the city for school properties actually taken, and a certain proportion of the bonded indebtedness of the county, and which would result in many other public improvements which had been paid for by the county in the territory annexed not being reimbursed to the county. Accordingly, said attorneys, with the knowledge, assent and subsequent ratification of the county and

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its officers, undertook to have the old statute with reference to annexation amended so as to provide reasonable compensation to the county for the public improvements in the county which had been constructed in the annexed territory at the expense of the county and its citizens. By the expenditure of much time, labor and skill, they succeeded in procuring the amendment of this law by which the county would be compensated for all of the public improvements within the extension and the value of all the school buildings damaged by reason of the extension. And the services thus rendered by the said John L. Lee and Volney E. Howard were worth at least the sum of $3,333.34.

"5. The said attorneys also, and under their contract of employment, repeatedly appeared before the branches of the council of the city of Lynchburg and committees thereof in endeavoring to restrict the territory so proposed to be annexed, and gathered and procured data and information, and presented and made legal arguments for the purpose of preventing the proposed annexation of the territories of said county, and in reducing and restricting such territory.

"6. By reason of the services so rendered, the said city abandoned its purpose and plan of annexing any part of the territory of said county, and said county has been saved the taxable values aforesaid and the incomes therefrom, and, in addition, has the advantage of the change in the statute law aforesaid in the event of further attempts or efforts of said city to annex any part of the territory of said county, and for the services so rendered by the said John L. Lee and Volney E. Howard and the benefit of which have been accepted by the said county, they deserve to have from said county the sum of, to-wit, $3,333.34."

The county filed the following grounds of defense:

"1. That the account in suit is not such as the board of supervisors had authority to allow.

"2. That the appellants have accepted the payments made to them by the board of supervisors of said county in full compensation for their services mentioned in said claim.

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"3. That the appellants cannot recover on both the express contract made in October, 1919, and on an implied contract.

"4. That the appellants cannot recover the $3,333.34 as both a contingent fee under said contract of October, 1919, and as a fee under an alleged *quantum meruit.*

"5. That no basis exists for ascertaining the amount of said contingent fee.

"6. That the contingency has not happened upon which the county's liability for said contingent fee was to arise.

"7. That the recovery sought by the appellants is not warranted by the contract of the appellee, express or implied.

"8. That performance of the county's agreement to pay said contingent fee was and is impossible.

"9. That the contract between the county and the appellants is an illegal one, and the appellants have no right of recovery either on said contract or by way of *quantum meruit* for the services claimed to have been rendered by them.

"10. The basis of compensation relied on by the appellants is different from that specified in said contract of October, 1919, and in their account filed before the board of supervisors of said county.

"11. The city of Lynchburg did not set on foot any proceedings for annexing any part of the territory of the said county.

"12. If any such proceedings ever were set on foot by said city, they were not abandoned by reason of the services specified in the account of the appellants or in the bill of particulars of their claim.

"13. That the contract of the parties expressly excludes the idea of any liability resting upon the county for the appellants' services in preventing future annexation attempts by the city of Lynchburg.

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"14. The supervisors of said county have never modified or consented to any modification of the alleged contract of October, 1919.

"15. The supervisors of said county had no authority in law to contract for the rendition of services in connection with the passage or amendment of laws by the legislature."

Upon these pleadings the case proceeded to trial.

The evidence before the jury, so far as need be mentioned, showed the following uncontroverted facts:

The attorneys rendered valuable services to the county in opposing the extension of the corporate limits of the city of Lynchburg while the subject was in the hands of the committee of the council of that city, and, as has all along been admitted by the county, fully performed on their part the first contract above mentioned in so far as concerned the services they were to render in order to entitle them to the certain fee provided for in that contract.

As to the contingent fee provided for in the contract just mentioned, the committee of said council never made to the council any report of any boundaries recommended by it to be taken into the city limits out of the territory of the county—the annexation proceedings did not in fact proceed that far—so that the first contract aforesaid never in fact became operative with respect to the contingent fee therein mentioned and no obligation on the part of the attorneys to render any further services under that contract, other than those which they did render as aforesaid, ever arose.

However, while engaged in rendering the services aforesaid, the attorneys, upon examination of the statute law as it then existed upon the subject of annexation of territory of a county to a city, concluded that the statute did not provide for proper reimbursement to the county for public improvements existing in the annexed territory. The attention of the Commonwealth's attorney and of individual members of the board of supervisors was called to this condition of the statute law by the attorneys, Lee and Howard.

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The session of the legislature was approaching, and it was the opinion of the attorneys that an amendment of the statute on the subject, so as to make provision for larger reimbursement to counties in cases of annexation, should be obtained at that session, as a measure both just in itself and as likely to be the most efficient way to put an entire end to the annexation proceedings aforesaid then on foot on the part of the city of Lynchburg. This opinion was concurred in by the Commonwealth's attorney and most, if not all, of the individual members of the board of supervisors, and they individually directed the attorneys to proceed to carry this idea suggested by the latter into effect. Accordingly, the attorneys, promptly and with great energy and ability, set about rendering their personal and professional services in this new direction, none of which services was within the contemplation of the county or the attorneys at the time the said first contract was entered into, or was embraced within any of its provisions.

There was, however, no meeting of the board of supervisors, as a corporate body, held for the consideration of this new subject, and no resolution of the board was adopted employing the attorneys to render any of the services which, as just mentioned, they undertook in the direction of obtaining such an amendment of the statute law as aforesaid.

Nevertheless, acting in the utmost good faith, in their zeal for the accomplishment of benefit to the county, and with the expectation that the county would deal justly with them and pay them for such services what they would be reasonably worth under the circumstances, the attorneys, without any express contract with the county on the subject, proceeded with the new services.

They enlisted the special interest of the delegate from the county in the legislature, Mr. Hicks, and the attorney for the city of Richmond in behalf of the proposed amendment of the statute aforesaid. The latter aided in present-

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ing the matter before the committees of the legislature. They drew, and Mr. Hicks introduced in the legislature, a bill for that purpose, known as the "Hicks bill." Theirs were the guiding hands in advice, direction and execution of the plans to accomplish the new purpose. They were engaged for more than a month in the new work. One of the attorneys spent some twenty-one days altogether in the city of Richmond, and in trips back and forth between Lynchburg and Richmond, presenting the matter before individual members and the committees of both houses of the legislature, and otherwise pressing the passage of the bill. It does not appear that Mr. Light did any of this new work.

There was also express testimony introduced in behalf of the attorneys, Lee and Howard, to the effect that these services were, in themselves, reasonably worth fully as much as the amount of compensation fixed by the verdict of the jury. The county, although it had full opportunity to do so, introduced no evidence of this character in rebuttal, contenting itself with objecting and excepting to this character of evidence as immaterial.

It was in connection with the work just mentioned that the expenses, to the amount of $635.66 were incurred which are mentioned in the resolution of the board of supervisors of May 3, 1920, above copied.

The "Hicks bill" was enacted into law, being approved March 10, 1920, and is contained in Acts 1920, page 210, *et seq.* Not being an emergency act, it did not go into effect until ninety days after the adjournment of the legislature, to-wit, until June 18, 1920.

Meanwhile, the city of Lynchburg adopted a commission form of government, under which the old city council was to become abolished and a new council was to come into existence. This new form of government was to go into effect on September 1, 1920.

On June 10, 1920, the aforesaid committee of the city council presented its report on the subject of the proposed

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annexation aforesaid to the council. This report is not in evidence, but it appears from the record that it made no recommendation of any boundaries of any territory to be taken into the city limits and reached no definite conclusion touching the desirability of any annexation from the standpoint of the city.

Thereupon, on June 10, 1920, the common council, and, on June 15, 1920, the board of aldermen, of the city of Lynchburg adopted the following resolution:

"Whereas, a special committee from the common council and the board of aldermen, appointed to consider the question of annexation, has for various reasons been unavoidably delayed in reaching definite conclusion touching the desirability from the city's standpoint of said annexation; and

"Whereas, there is now no apparent need for haste for a final decision in the premises, especially as annexation would necessitate the assumption of additional obligations by the city and possible issuance of bonds to cover same, sale of which under present financial conditions could not readily be had; and

"Whereas, Samuel L. Rogers, director of United States census, has indicated that announcement of the preliminary total for the population of the city of Lynchburg will only be delayed until June 15th; and

"Whereas, the new form of government will go into effect within less than ninety days (September 1, 1920);

"Now, therefore, be it resolved, That the entire question of annexation of certain parts of Campbell county to the city of Lynchburg be referred to the incoming council for consideration and action.

Second: That all papers be placed in the hands of the clerk of the council."

On September 18, 1920, the new council of the city adopted the following resolution:

"It appearing expedient to this council, it is hereby resolved and ordered that the proceedings heretofore set on

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foot and now pending for the extension of the corporate limits of the city of Lynchburg, so as to take in a part of the present territory of Campbell county, be, and the same is hereby, abandoned; and the city attorney is so instructed."

On October 18, 1920, Mr. Lee and Mr. Light appeared before the board of supervisors and presented the account above copied of Messrs. Light, Lee and Howard against the county for the certain fee of $3,000.00 and for the further fee of $5,000.00, these gentlemen each claiming to be entitled to one-third of such fees. Mr. Howard was not present at this meeting of the board, and did not know that the account would be then presented. Mr. Lee testified on the subject of the presentation of the account before the board on this occasion as follows:

"I went before the board, and after a while they were kind enough to give me a hearing. I tried to be very frank with them indeed. I told them very briefly of the work we had done and I pointed out to them the clause in the contract which was now in some sense the matter of the fee. The contract provided that we were to have one-third of the first year's taxes or an amount equal to one-third after the committee had made this report. I said to them, 'Gentlemen, the committee has never made any report, but that is no grounds for dispute, and I have been living in the county the best part of my life and we do not want to have any trouble about it; and while I am not authorized to speak for Mr. Howard, and I do not represent him, and have no right to speak for him at all, you gentlemen, under our contract, would owe us $5,000.00 contingent fee plus the $3,000.00, which would make altogether $8,000.00.' I also said: 'If you will pay each of us $2,000.00, making a total of $6,000.00 instead of the $8,000.00, I will be perfectly satisfied with that, and, while I tell you I have no right to bind Mr. Howard, I am perfectly sure that he will abide by my decision.'

"Q. Was Mr. Light present?

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"A. Oh, yes, and we were discussing it and he said that he would abide by my decision. To my utter amazement, the board—I am sure they did not mean to do it—did not seem to think we had done any work, and undertook to say that we had never gone into the court; and then about that time Judge Nelson made some suggestion about this matter having gone on for years, and so on, and so on, and I am frank to tell you that I was mortified and disgusted * * *. I was disappointed and disgusted, and I said, 'If you will give me my thousand dollars I will get out of it and won't have anything more to do with you.'"

Mr. Lee testified that he thereupon left the meeting of the board.

Thereupon, the board adopted the following resolution:

"It is ordered that a warrant for the sum of one thousand dollars be issued to Volney E. Howard, John L. Lee and A. H. Light, each in full compensation for their services in representing Campbell county in the recent move by the city of Lynchburg to annex certain territory belonging to Campbell county."

On being informed of the last-named action of the board, Messrs. Lee and Howard applied to the board for a rehearing, which was granted and was given at a meeting of the board held on November 15, 1920.

At this meeting of the board, Messrs. Light, Lee and Howard were all present, and it developed that Mr. Light had stated to a member of the board that he thought a fee of $1,000.00 each, to himself and Messrs. Lee and Howard, was sufficient compensation for all services under the first contract and also for the work done in obtaining the passage of the "Hicks bill," and Mr. Light admitted that this was true. Mr. Howard testified that when Mr. Light made this admission before the board, the following occurred: "I said to him: 'Light, why didn't you tell me so; why haven't you told me so all the time? You have been with us all the time in presenting this, and I was in your office talking to

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you about it this morning—why didn't you tell me so?' He never did answer that question, and that was the first time I had any intimation that he was not. He was, up to that time, just as eager for it as we were. But * * * when we found that he had talked to the board privately, I said: 'Well, we will mark your name off this thing, and I will put it for two-thirds of the $5,000.00; and that is why it is now two-thirds instead of all of it, and that was done in the presence of the board of supervisors."

At the close of this rehearing, the board, on that date—November 15, 1920—adopted the following resolution:

"John L. Lee and Volney E. Howard this day appeared before the board and asked for a rehearing on the question of their fee for representing Campbell county in the recent annexation movement by the city of Lynchburg, which said request was granted, and after hearing said Lee and Howard, Frank Nelson made a motion that the order entered at the last meeting allowing the attorneys representing Campbell county a fee of one thousand dollars each be rescinded, but said motion, not meeting with a second, was declared lost. Then M. L. Booth, Jr., made a motion that, in view of the fact that two of said lawyers—namely, John L. Lee and A. H. Light—having expressed themselves at the last meeting as being satisfied with the amount allowed them, respectively, for their services in said case, the board declined to make any further allowance to any of the attorneys in said case, which motion, being seconded by H. R. Lewis, was put to a vote and carried, whereupon the same was declared adopted, and the bill presented by said Lee and Howard for two-thirds of a contingent fee of $5,000.00 claimed by them was not allowed. From the action of the board in thus declining to allow said bill, the said Lee and Howard noted an appeal to the circuit court of Campbell county."

The attorneys, Lee and Howard, immediately gave notice of appeal from such action of the board, as the statute in

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such case requires, and Mr. Howard, the next day, wrote the clerk of the board, inclosing the bond required by statute to perfect such appeal, and in that letter stated: "Please * * * send my $1,000.00 warrant as soon as you can * * *." That was the warrant in favor of Mr. Howard authorized by the resolution of October 18, 1920, above copied. This warrant was accordingly then issued and sent to Mr. Howard. It bears date and reads as follows: "November 16, 1920—$1,000.00. To the treasurer of Campbell county. Pay to Volney E. Howard or order $1,000.00 out of the county funds for 1920. Fee in annexation case." This warrant was thereafter paid to Mr. Howard by the county.

Mr. Lee received a similar warrant after the appeal aforesaid had been taken and perfected as aforesaid, and thereafter that warrant was paid to Mr. Lee by the county.

On the subject of the expense account above mentioned, allowed by the resolution of the board of supervisors of May 3, 1920, above copied, and, of that meeting of the board, this should be said: It appears in evidence that neither Mr. Howard nor Mr. Lee were present at that meeting, or knew of the provisions of that resolution until after the warrant for the expenses was cashed by Mr. Lee. This account was presented to the board for them by Mr. Light. Mr. Lee received the county warrant for the amount of these expenses, it being sent to him by the clerk of the board. This warrant had an addendum to it, which was as follows: "Part payment of fee in annexation case." It was received by Mr. Lee on May 20, 1920. He at once wrote to the clerk of the board as follows:

"My dear Woodson:

"I am in receipt of county warrant for $635.66. I observe, however, an endorsement on the warrant as follows:

"'Part payment of fee in annexation case.'

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"I presume that you put this endorsement on the warrant by mistake, because the amount is simply refunding to me my expenses in Richmond, and is no part of my fee, nor any part of the fee due Mr. Howard or Mr. Light.

"Of course, I know that you fully understand this. I shall have the warrant cashed, however, but only with the distinct understanding that it is no part whatever of the fee of either of us in the annexation proceedings.

"I am very much obliged to you for your kind attention to this matter."

Mr. Lee testifies further on this subject as follows:

"Q. Mr. Woodson was the clerk of the board?

"A. Yes; then I further went to Richmond again—I cannot say when, as these things do not remain in my mind—and I had a talk with Mr. Woodson and Mr. Light, both, and was told by them that there would be no difficulty about the board paying these expenses separate and apart from the fee, and that is why I referred to Mr. Woodson. Of course, Mr. Light knew it because he was presenting the bill for collection."

The court gave the following instructions (Nos. 1, 1-a, 1-b, and 2 were given at the request of the attorneys, over the objection of the county. It does not appear from the record at whose instance Nos. 3, 4, 5, 6, 7, 8 and 9 were given, but presumably they were given at the request of the county):

"1. The court instructs the jury that if they believe from the evidence that the plaintiffs, John L. Lee and Volney E. Howard, as the employed attorneys for the county of Campbell, rendered services to said county in pursuance of their employment under contract with the board of supervisors of said county as expressed in the resolution of said board, to-wit, October 20, 1919, and that through their services the said county obtained the benefits contemplated by said employment, then the plaintiffs are entitled to be compen-

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sated for such services upon the basis of what is fair and just for such benefits as were received by said county therefrom.

"1-a. And if the jury shall further believe from the evidence that the object and purpose of said plaintiffs' employment was to prevent loss of territory and taxable values of said county, then, for the services rendered by them to that end, with the knowledge of said board and not dissented to stopped or prohibited by it, and from which said county received benefits—the plaintiffs should be compensated on the basis of what is just and fair remuneration for such benefits.

"1-b. And in determining the amount of compensation, if any, to be awarded the plaintiffs, the jury may take into consideration the extent and value of the benefits, if any, secured by the plaintiffs' services to said county and also the terms of compensation expressed in the aforesaid resolution, but the recovery in this case, should the jury find for the plaintiffs, cannot exceed $3,333.34.

"2. The court instructs the jury that if the plaintiff, Volney E. Howard, did not authorize or did not subsequently ratify what was done and said by the plaintiff, John L. Lee, at the October, 1920, meeting of the board of supervisors, then the said Howard is not precluded or affected thereby. And the court further instructs the jury that, even if they believe an accord was had between the plaintiff, John L. Lee, and the board of supervisors at the meeting of said board in October, 1920, by which the said Lee was to receive $1,000.00 in full for his services, but before said sum of $1,000.00 was received by said Lee he did, with the knowledge of said board, note an appeal from its action in allowing him the sum of $1,000.00 as full compensation, and that said board had knowledge of said appeal, and that, after and with such knowledge, there was paid to said Lee the said sum of $1,000.00, this does not constitute an accord and satisfaction precluding him from asserting the balance

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of his claim for services; and the burden is on the party asserting accord and satisfaction to prove that when such payment was made it was accepted by said Lee in full satisfaction.

"3. The court instructs the jury that the contract between the plaintiffs and the defendant is the order of the board of supervisors of October, 1919, and that the rights of the parties should be determined according to this order, which constitutes a contract between them under the circumstances.

"4. The court instructs the jury that if they believe from the evidence that the $3,000.00 certain fee has been paid by the board of supervisors of Campbell county to John L. Lee, Volney E. Howard and A. H. Light as provided by provision one (1) of said order of October, 1919, then no further verdict can be found for the plaintiffs in this case as to the certain fee, and the jury must find for the defendant as to said certain fee.

"5. The court further instructs the jury that if they believe from the evidence that said $1,000.00 warrants were ordered to be issued to said Lee and Howard, respectively, in addition to a warrant for their expense item of $635.66 mentioned in the minutes of the supervisors' meeting of May 3, 1920, as a compromise settlement of their fee claim then in dispute, and that said Lee accepted his warrant as such a settlement, then they must find for said county so far as said Lee's part of the claim in dispute is concerned.

"6. The court instructs the jury that a fee, the liability for which arises by implication of law, as distinguished from the express contract of the parties, is not a contingent fee.

"7. The court instructs the jury that if they believe from the evidence that the plaintiffs, John L. Lee and Volney E. Howard, accepted the warrants of the board of supervisors of Campbell county for $1,000.00 each, in full settlement for services rendered under the order of the board of super-

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visors of October, 1919, then they must find for the defendant.

"8. If the jury believe from the evidence that the claim of Lee and Howard is based upon the value of their services to said county, and that the sum of $1,000.00 each and expenses is a reasonable compensation to them for their services, and that said sum and expenses have been paid, they must find for the county.

"9. The court instructs the jury that the board of supervisors of Campbell county are public officers and cannot deal with the county's property as an individual can deal with his own property, but that the board of supervisors can only do such things and perform such acts as the laws authorize them to do and perform."

The following instructions were offered by the county and refused by the court:

"A. The court instructs the jury that the account which is the subject of this appeal is not such an account as the supervisors of Campbell county had a legal right to allow, and, therefore, the action of the said board in disallowing the same was not erroneous. Code, section 2759.

"B. The court instructs the jury that if they believe from the evidence that the claim of the plaintiffs in this case is not based upon the order of the board of supervisors of Campbell county of October, 1919, but is based upon the amount the plaintiffs contend they deserve outside of said contract for services rendered, then the court instructs the jury that unless the account of the plaintiffs filed before said board of supervisors shows the time actually and necessarily devoted to the performance of the services charged in such account and was verified by affidavit filed therewith before the said board of supervisors from which this appeal was taken, then they must find for the defendant, as to any claim not based upon said order of October, 1919.

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"C. The court further instructs the jury that the words, 'fee in annexation case,' appearing on the warrants in favor of said Lee and Howard introduced in the evidence, mean the entire fee in said case, whether a part thereof was contracted to be paid as a certain fee and a part *thereof* as a contingent fee or not; and if the jury believe from the evidence that at the time of the entry of the order for the issuance of said warrants the claim of said Lee and Howard was disputed, and that the said Lee and Howard received payment of said warrants with said words written thereon, then they are not entitled to recover in this case, even though the jury may further believe from the evidence that said warrants were accepted under protest and after this appeal had been taken.

"D. The court further instructs the jury that if they believe from the evidence that the claim involved in this appeal was in dispute when the meeting of the board of supervisors of Campbell county of October 18, 1920, was held—that said board, at said meeting, ordered that a warrant for the sum of $1,000.00 be issued to said Lee and Howard each, in full compensation for their services in representing said county in the move by the city of Lynchburg to annex certain territory belonging to said county; that the said warrants were issued and delivered to said Lee and Howard pursuant to said order, and that said Lee and Howard received payment thereof with knowledge of said order, then the jury must find for said county, even though they may also believe from the evidence that said warrants were accepted under protest and after the taking of this appeal.

"E. The court further instructs the jury that if they believe from the evidence that the appellants, John L. Lee and Volney E. Howard, rendered the services mentioned in their testimony with the intention and expectation that they and Mr. Light were to be paid therefor a fee certain of $3,000.00 and a contingent fee not to exceed $5,000.00, said contingent fee to be based on the taxes to be saved to Camp-

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bell county and its subdivisions as the result of said services; and if the jury further believe from the evidence that said fee *certain* has been paid, then they must find for the county.

"F. The court further instructs the jury that, even though they believe from the evidence that some, or even all, of the board of supervisors and other officers of said county had knowledge of the rendition by Messrs. Lee and Howard of the services mentioned in said Lee and Howard's testimony as having been rendered in connection with the passage of the Hicks bill by the Virginia legislature, and that said supervisors and officers, as individuals, acquiesced in said rendition, yet, unless the jury further believe from the evidence that such acquiescence was had by said board in session at such an authorized meeting, duly held, the said county is not bound by said acquiescence, and is not liable for any fee so far as it is based on said services.

"G. The court instructs the jury that, because of the impossibility of determining whether or not the council of the city of Lynchburg would have decided to attempt to make an annexation of territory from Campbell county, even if no objection had been made thereto by said county, there is no basis for a finding that the services of said Lee and Howard were beneficial to said county in that connection and no basis for a recovery in their favor based on benefit; and if the jury believe from the evidence that the said board of supervisors intended that the liability of the county over and above the sum of $3,000.00 was to be contingent upon the benefit to said county as the result of the said Lee and Howard's services, and that the said $3,000.00 has been paid, they must find for said county."

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The questions presented by the assignments of error will be disposed of in their order as stated below.

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1 }

1. Were instructions 1, 1-a and 1-b erroneous, in that they set up a wrong standard by which the jury were directed to measure the amount of recovery, namely: the value of the benefit derived by the county from the services in question (*i. e.*, the value of the services on a *quantum valebat*), instead of the value in itself of the work done (*i. e.*, the value of the services on a *quantum meruit*)?

The question must be answered in the affirmative.

As said in Sedgwick on Damages (9th ed.), sections 649 and 650: "For property transferred or services rendered by one to another, the law implies a promise to pay what the thing or the property is worth. The party then recovers—to use technical language—on a *quantum meruit* or a *quantum valebat;* and the measure of damages becomes a question of evidence as to the value of the property or services. *Nor can this rule be varied, except by express agreement* * * *. When recovery is had on a *quantum meruit* for *services* rendered to or benefit conferred upon the defendant at his request, the measure of compensation is *the value of the work done.* * * * *not the benefit derived by the defendant from it;* the same is true where the services or benefit are accepted by the defendant, though not originally rendered at his request. If the plaintiff has rendered services, the measure of recovery is the value of the services, not of the product of the services." (Italics supplied.)

Again, in section 664 of the same valuable work, this is said: "If a servant fully performs his contract, but the contract allows him no definite compensation, he is allowed to recover on a *quantum meruit* the value of the services performed, without regard to the amount of benefit which the principal, or master, received from them."

As appears from the authorities cited for the attorneys on the question under consideration, namely, *Smith* v. *Packard,* 94 Va. 730; *B. & O. R. R. Co.* v. *Polly, Woods & Co.,* 14 Gratt. (54 Va.) 447; note to *Cutter* v. *Powell,* 2 Smith's

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Lead. Cases (5th ed.) 42; and Burks' Pl. & Pr. (2nd ed.), pp. 119, *et seq.*—the instructions under consideration were based on the erroneous idea that contracts for the manufacture of chattels, or for the construction of buildings, or other structures, out of materials furnished by a plaintiff, where the finished work is accepted by the defendant, stand upon the same footing with respect to the measure of compensation as contracts for personal services rendered by a plaintiff at the instance and request of and accepted by the defendant. There is a marked distinction between the two classes of contracts. In the former class, tangible property, consisting of the finished article, or structure, is actually transferred by the plaintiff to the defendant, the value of which, on a *quantum valebat,* is not something which is speculative, remote or contingent, but is capable of present definite ascertainment under well-settled rules of evidence. So that, in that class of cases, where the circumstances are such that the doctrine of "unjust enrichment" is applicable and because it is *ex aequo et bono* (*i. e.,* it is equitable and just), so to do, the law implies the promise of the defendant to pay the value to him, on a *quantum valebat,* of the property which he has accepted, and hence that value is used, in such case, as the measure of the recovery to which the plaintiff is entitled. Keener on Quasi-Contracts, pp. 388 to 410. But where the services involved do not add to the property or wealth of the defendant, but tend merely to save him from loss of property or money which he already has, different principles are involved. And generally, in the class of cases involving only purely personal services, unattended with any actual transferring of tangible property, in the absence of special contract to the contrary, express or implied *in fact* (as distinguished from one which the law implies)—the sole measure of the recovery is the value in itself of the work done, on a *quantum meruit.*

Accordingly, we find that the settled rule, laid down by the authorities, almost if not quite unanimously, is that the

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measure of compensation which attorneys at law are entitled to recover for services rendered under an employment which contains no provision fixing a definite compensation, is the reasonable value of the services rendered, not in benefit to the client, but, in themselves, on a *quantum meruit;* and that the circumstances to be considered in determining the compensation to be recovered are the amount and character of the services rendered; the responsibility imposed; the labor, time and trouble involved; the character and importance of the matter in which the services are rendered; the amount of the money or the value of the property to be affected; the professional skill and experience called for; the character and standing in their profession of the attorneys; and whether or not the fee is absolute or contingent, it being a recognized rule that an attorney may properly charge a much larger fee where it is to be contingent than where it is not so. The result secured by the services of the attorney may likewise be considered, but merely as bearing upon the consideration of the efficiency with which they were rendered; and, in that way, upon their value on a *quantum meruit,* not from the standpoint of their value to the client. 9 Cyc. 983, 994, 3 Am. & Eng. Enc. of Law (2nd ed.), pp. 419-423; *Bills* v. *Polk,* 72 Tenn. 494; *People* v. *Supervisors,* 45 N. Y. 196; *Galvert* v. *Coxe,* 1 Md. 95; *Christy* v. *Douglas* (Ohio), Wright's Rep. 485; *Stevens* v. *Ellsworth* (Iowa), 63 N. W. 683; *Seloner* v. *Bryant,* 54 Minn. 434; *Randall* v. *Packard,* 142 N. Y. 47; *Stanton* v. *Embrey,* 93 U. S. 557, 23 L. Ed. 983; *Yates* v. *Robertson,* 80 Va. 475.

2.

2. Was the error in the instructions above pointed out harmful, and, therefore, reversible error?

This question must be answered in the negative.

There was evidence introduced before the jury in behalf of the attorneys upon the correct theory that the measure of recovery was on a *quantum meruit,* as well as upon the theory of the instructions above considered. There was

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ample evidence to sustain the verdict upon the correct theory. In view of the character and importance of the matter in which the services in question were rendered; the responsibility imposed upon the attorneys; the professional skill and experience called for, and the character and standing of the attorneys in their profession, as shown by the evidence, it is plain that the compensation fixed by the verdict and judgment under review, of $2,000.00 to both, or $1,000.00 to each of the attorneys, was but a reasonable compensation on a *quantum meruit.*

Of the compensation to which an attorney is entitled on a *quantum meruit,* this is said in *People* v. *Supervisors, supra* (45 N. Y.), at p. 202: "He should be paid what his services are reasonably worth. Not according to what they produced to his client, but what such services, in themselves considered, were reasonably worth, looking to the labor, time, talent and skill expended in the bestowal of them."

As said in *Eggleston* v. *Boardman, supra* (37 Mich.), at pp. 17 and 18: "The artist who transfers to the canvas the living likeness, destined perhaps to become immortal as a work of art, is entitled to a vastly higher compensation than he would be for spending the same time in painting buildings * * *. The recompense to be paid the sculptor, who conceives, molds and produces his masterpiece of form, cannot be measured and fixed by a standard based alone upon the time spent in its production * * *. The productions of the composer, the poet and the author, cannot be valued by the time apparently spent in their preparation. They are formed of a combination of ideas, which may have cost their authors years of application to complete.

"The lawyer, who, in order to excel in his profession, has devoted years to preliminary studies and has spent much labor and money to thoroughly fit himself for his calling, so that he might be able to act as an advocate * * * or as a counsellor to guide and direct others—to furnish them from his vast storehouse of knowledge, ripened and per-

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fected from long experience, with such ideas and suggestions which, when carried out and followed up, would lead to success—how shall his services be estimated?

"It is very evident that the responsibility, the care, the anxiety and mental labor is much greater in a case where the amount in controversy is large than where it is insignificant * * *. Nor is the responsibility, care and mental labor dependent alone upon the number of hours or days which may be given to the preparation and trial or argument of the case * * *.

"We can see no analogy between this kind or class of work and that performed by the laborer, nor can the creditable fact that attorneys generally, where the amount in controversy is small, or their client is poor, charge and receive much less than their services may in fact have been worth, prevent their recovering reasonable compensation in proportion to the magnitude of the interests committed to their care. In fact, in all cases, the professional skill and standing of the person employed, his experience, the nature of the controversy, both in regard to the amount involved and the character and nature of the questions raised in the case, as well as the result, must all be taken into consideration in fixing the value of the services rendered."

3

3. Were instructions 1 and 1-b erroneous in that they permitted a recovery for services rendered under a special contract, measured in amount otherwise than by the provisions of the special contract on that subject?

The question must be answered in the affirmative.

The instruction was plainly contrary to the well-settled law on the subject.

As said by Lord Kenyon, C. J., in *Cutter* v. *Powell,* 2 Smith's Lead. Cases, at p. 1217: "That where the parties have come to an express contract none can be implied, has prevailed so long as to be reduced to an axiom in the law." To the same effect, see *Grice* v. *Todd,* 120 Va. 481, 13 Va.

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App. 504; *Norfolk* v. *Norfolk County*, Id. 356, 13 Va. App. 324; Burks' Pl. & Pr. (2nd ed.), pp. 112-114.

This rule, however, is applicable only where there is a special contract in existence which embraces the services in question and which stipulates what the compensation shall be for the services and that contract is open—*i. e.*, unperformed on the part of the person who seeks to recover upon an implied contract compensation for what he has done. The principle involved is this: If one is in default in the performance of an existing contract obligation, he may not escape that obligation by the expedient of setting up an alleged implied contract which is different in its obligation. Note to *Cutter* v. *Powell, supra*, p. 1226, *et seq.* In the instant case the services in question were not within the contemplation of or embraced in the special contract (*i. e.*, the first contract aforesaid). There was no stipulation in the special contract providing what the compensation for those services should be. And the special contract in fact never became operative beyond the services which were rendered thereunder for the certain fee therein provided for; it was by mutual consent wholly abandoned, and thus rescinded, in so far as its provisions concerned the services to be rendered for the contingent fee therein mentioned; and, hence, it could not be regarded as "open" *quoad* the attorneys.

But, it is manifest that, while theoretically erroneous, the instruction had no harmful effect upon the verdict. The evidence before the jury clearly established the fact that the services in question were not rendered under the special contract mentioned in the instructions, but under a subsequent and different employment, which, however, did not fix the measure of compensation, so that, as aforesaid, that measure was fixed by the contract which the law in such case implied; and, as also in substance above stated, when tested by the application of that standard, no other proper verdict could have been rendered. The error under consideration, therefore, was not harmful.

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4. Were instructions 1, 1-a, and 1-b erroneous, as in conflict with instruction 3, all given by the court?

The question must be answered in the affirmative.

But instruction 3 was itself erroneous, in view of the uncontroverted evidence in the case. It ignored and was directly at variance with the evidence, which, as aforesaid, was to the effect that the services in question were not within the contemplation of the parties when the special contract mentioned in the instruction was made, and were not embraced within its terms. Moreover, it was obvious from the language of the special contract itself that such services were not embraced within its terms.

It is earnestly and ably argued in behalf of the county that the services were rendered under the special contract as substituted services, under the subsequent mutual agreement on the part of the county and the attorneys, which left in force and unaffected the provision of the special contract to the effect that nothing was owing from the county thereunder in addition to the certain fee provided for, except upon the happening of the contingency therein stipulated, namely, the making of a report by the committee of the city council recommending exact boundaries of territory to be taken into the city limits. If there had been such a mutual agreement it would, indeed, have amounted to a modification of the special contract merely in the single particular of the character of the services therein provided for, and the attorneys would find themselves thereby neatly placed in the *cul-de-sac* which the argument for the the county provides for them. But, even if that were so, the contract under which the services were rendered would not be the original special contract aforesaid, as is announced in instruction 3, but that contract as modified by the mutual agreement; and, as said in 6 R. C. L., sec. 298, pp. 914-5: "In such case the contract must be proved partly by the written and partly by the subsequent oral contract which has thus been incorporated into and made part of the original con-

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tract." However, as the prime object of the new services was to put an end to all further action on the part of the city in the annexation proceeding, which would have had the precise effect of preventing the happening of the contingency aforesaid, the idea that the attorneys consented to the modification of the original contract merely in the single particular aforesaid, seems to be negatived by the very character of the new services and of the undertaking to render them. And all the evidence on the subject makes it plain, indeed, as aforesaid, that the original special contract never became further operative than as concerned the certain fee and the services to be rendered for that fee; that it was by mutual consent of the county and the attorneys wholly abandoned and considered as discharged by the services rendered thereunder for the certain fee, and by the payment by the county of such fee; so that, as also above stated, such special contract did not in fact remain open, *i. e.*, unperformed on the part of the attorneys. 6 R. C. L., sec. 298, pp. 914-5; Elliott on Contracts, secs. 1856, 1857, 1858, 1859, 1865.

It follows from what has been said that the erroneous conflict in the instructions under consideration was error, but harmless error.

5 }

5. Is the requirement of section 2759 of the Code, with respect to such an account as that involved in this case (namely, that the time actually and necessarily devoted to the performance of the services shall be verified by affidavit filed with the account), jurisdictional, so that the circuit court, on the trial of the appeal, had no authority to enter the judgment under review, in the absence of the filing of such specific affidavit with the account?

The question must be answered in the negative.

Under the provisions of section 2763 of the Code, the trial in the circuit court, on the appeal from the action of the board of supervisors, was practically *de novo*. On that trial, the pleadings and evidence permitted by the statute,

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and which appear from the record, were sufficient to support the judgment.

This disposes of the assignments of error based on the refusal of the court to give instructions A and B, asked for by the county.

6 }

6. Did the court err in refusing to give instruction E, asked for by the county?

The question must be answered in the negative.

The point urged in argument for the county in support of this instruction is that the original special contract provided that the contingent fee was to be paid out of the county and district levies. That these levies were appropriated by the Constitution and statute laws on the subject to other purposes, so that to use them for the payment of such contingent fee would be a misappropriation of such funds and, therefore, illegal.

The answer to this is, in the first place, that the reference in the original contract to the levies in question was merely as a measure of the amount of the contingent compensation provided by the contract for the contingent services which might be rendered thereunder. The payment was to be made, not out of the district, but out of the general county levy. Section 2728 of the Code authorizes the board of supervisors to make the original special contract; and, hence, to make the account for such services chargeable against the county; so that under other sections of the Code the allowance and payment of the account for the services would not have been illegal, but lawful.

Secondly: As aforesaid, the evidence plainly shows that the services in question were not rendered under the original contract, and that the provision therein with reference to the taxes had no reference to the compensation for those services.

7 }

7. Was the action of the court erroneous in giving instruction 1-a and in refusing instruction F, asked for by the county, in that the court thus, in substance, instructed

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the jury that they could imply a contract of employment of the attorneys on the part of the county without corporate action of the board of supervisors on the subject, evidenced by resolution adopted by such board?

The question must be answered in the affirmative.

The statute (section 2728 of the Code), under which such an employment is alone authorized so as to render the county chargeable for the services in question, requires the employment to be made by the board of supervisors; and the board can act in such a case, so as to obligate the county, only at authorized meetings duly held, and as a corporate body, by resolution duly adopted, and not by the action of its members separately and individually. *Lynchburg* v. *Amherst County,* 115 Va. 600, 8 Va. App. 472; *Manly* v. *Broaddus,* 94 Va., at p. 552; 2 Dillon on Mun. Corp. (5th ed.), secs. 501, 793, 794, 795; 1 Mechem on Agency, sec. 763. There are cases which constitute exceptions to the general rule requiring the corporate action above mentioned, in order to bind the municipality or county; but, in view of the fact that there was such corporate action in the instant case constituting evidence of the fact of the employment under which the services were rendered, it is unnecessary for us to here distinguish the exceptional cases.

By the resolution of the board of supervisors adopted on May 3, 1920, the fact that the attorneys acted as "counsel for (the) county (in) * * *, having an act passed by the General Assembly of Virginia" (the "Hicks bill"), was evidenced. This resolution plainly recognized that the services touching this act were rendered by the attorneys as counsel for the county—that the employment of the attorneys by the county existed in such matter—which employment, as we have seen, was a wholly different employment from and one not embraced in the aforesaid first contract. That was a ratification, by corporate action of the board, of the preceding unauthorized action of the Commonwealth's

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attorney and individual members of the board, under which employment the services in question were rendered by the attorneys, Lee and Howard, and was an acceptance of the services as having been rendered for the county under such employment. This as effectually bound the county by the obligation of the employment of the attorneys as if such employment had been evidenced by resolution of the board adopted before the services were rendered. 2 Dillon on Mun. Corp. (5th d.), secs. 797, 798, 799, and authorities cited in the notes; 11 Cyc. 478; 15 C. J., sec. 250, p. 554.

Therefore, the action of the court under consideration, though erroneous, was harmless error.

8. It is urged on the part of the county that the resolution of May 3, 1920, contains qualifying language which evidences that the employment just referred to was under the original special contract aforesaid. Concerning that position, this will be observed.

The qualifying language referred to, contained in the resolution just mentioned, is used in connection with the allowance of the account for the expenses mentioned, and states that "said account is ordered to be paid, with the understanding that the amount shall be deducted from the fee of said attorneys for defending the aforesaid suit." Upon its face it has no reference to the terms of the employment under which the services were rendered in connection with the "Hicks bill," *i. e.*, to any "understanding" with which those services were rendered existing at the time of the service. It is a subsequent "understanding" which, manifestly, the board seeks to attach to the acceptance by the attorneys of the money to be thereafter paid under the resolution, and has to do with the fee on which the expenses were to be credited—*prima facie* the certain fee provided for in the original contract, and not the unfixed compensation for the services rendered in having the "Hicks bill" passed. It would be a most strained construction to give this language the meaning that the latter services were ren-

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dered with the understanding mentioned; and certainly, in view of the fact that neither of the attorneys, Lee or Howard, were present or knew of the contents of the resolution when it was adopted, such *ex parte* statement on the part of the county cannot be given the construction, that it evidences what was the mutual understanding of the attorneys, as well as of the county, under which these services were rendered.

9. Did the court err in refusing instruction G, asked for by the county?

This question must be answered in the negative.

As we have seen above, the benefit to the county was not the proper measure of recovery in such a case as this. Hence, instruction G on that subject was not a proper instruction.

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10. Were the services of the attorneys in connection with the passage of the "Hicks bill" lobbying services which were illegal under section 4499 of the Code, so that the law will not imply a promise to pay therefor?

The question must be answered in the negative.

As held in *Yates* v. *Robertson, supra* (80 Va. 475), this statute "aims at the offense of paying money, or other compensation, to secure the passage or defeat of any measure, and was doubtless intended to apply to the use of the money in buying votes, etc., and not to contracts with attorneys for purely professional services, such as drafting petitions. writing forth client's claim, taking testimony, collecting facts, preparing arguments, oral or written, addresses to the legislature or its committees, with the intention to reach its reason by argument. Hence, contracts for the latter purpose are valid."

The only evidence of the services of the attorneys appearing from the record, which it is claimed by the county would have rendered a contract therefor illegal, is the following:

That one of the attorneys interviewed, outside of the committee room, individual members of the legislature, and

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especially members of the committees which would have to consider and report upon the "Hicks bill" merely for the purpose of having them understand the merits of the bill and to reach their reason by argument.

We are of opinion that there was nothing illegal or improper in the conduct mentioned. The same principle which permits the presentation of desired legislation and its alleged merits to the legislature as a body, or to its committees, purely with the intention of reaching their reason by argument, is applicable to the like presentation to the individual members of the legislature. Hence, contracts with attorneys for services rendered to that end are not illegal.

The authorities very generally hold that a contract to pay for services to be performed in the endeavor to obtain or defeat legislation by other means than the use of argument addressed to the reason of the legislators, such as, for example, for the exertion of personal or political influence apart from the appeal to reason as applied to the consideration of the merits or demerits of the legislation in question. is an illegal contract. *Burke* v. *Child,* 24 Wall. 441, 22 L. Ed. 623; *Earle* v. *Myers,* 207 U. S. 244, 52 L. Ed. 191; *Houlton* v. *Nichol,* 93 Wis. 393, 57 Am. St. Rep. 928; note L. R. A. 1917-B 368, *et seq.; Stromer* v. *Van Orsdel* (Neb.). 121 Am. St. Rep. 728; note in 66 Am. St. Rep. 506-7. As, however, as aforesaid, the contract in the case in judgment was merely for services consisting of the presentation of argument addressed to the reason of the legislators, the present case does not fall within such holding.

There are cases which hold that contracts of an attorney for lobbying services of any character whatsoever are illegal. 2 R. C. L., p. 1041. But by the great weight of authority, the distinction referred to in the paragraph next above is recognized, and such contracts as embrace merely services which appeal to the reason are held to be valid.

There are also cases which hold that, without legislative authority, municipalities and counties may not use the pub-

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lic funds to pay for lobbying services of any character. *Richardson* v. *Scott Bluff County* (Neb.), 80 Am. St. Rep. 689; note L. R. A. 1917, 358, *et seq.*, and authorities cited on this subject. See, however, for the holding *per contra*, where the contract is for lobbying services consisting of argument addressed only to the reason of the members of the legislative body sought to be influenced. Note L. R. A. 1917-B 359, *et seq.*, and authorities cited on this subject. But since we have in Virginia the statute aforesaid (section 2728 of the Code), which, so far as material, provides that the board of supervisors "shall have power * * * to employ counsel * * * in any matter affecting county property where the board is of opinion that such counsel is needed" (a provision which is so broad that it undoubtedly confers upon the board of supervisors the authority to contract for the employment in question in the case in judgment), it is unnecessary for us to enter upon a consideration of the question of whether the contract of employment on the part of the county would have been illegal but for the Virginia statute just cited, or to deal with the authorities on that subject more in detail than is done above.

We come now to the sole question which remains for our decision, and that is this:

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11. Does the evidence on the subject show that the acceptance by the attorneys, respectively, of the payment of the $1,000 to each of them, was in execution of an accord and satisfaction which barred the demands of the attorneys involved in this case?

The question must be answered in the negative.

The circumstances relied on by the county to have the effect in question upon the demand of Mr. Lee are the following: That he accepted payment of the warrant for the expenses, issued to him in May, 1920, under the resolution of the board of supervisors of May 3, 1920, containing the stipulation to the effect that it was issued "with the understanding that the amount thereof shall be deducted from

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the fee of said attorneys for defending the aforesaid suit"; and that the warrant for the $1,000.00 paid him was issued to him in acceptance on the part of the county of his own proposition to the board, made at their October 18, 1920, meeting, to-wit, "if you will give me my thousand dollars I will get out of it and won't have anything more to do with you?"

But neither at common law nor under the statute in Virginia on the subject of an accord and satisfaction (section 5765 of the Code) was the *ex parte* stipulation in the warrant for the expenses evidence of any agreement on the part of Mr. Lee to that effect. He was not present at this board meeting; never agreed to the stipulation; promptly repudiated its binding force upon him as soon as he received the warrant, and at once gave constructive notice thereof to the county, which was equivalent to actual notice, before he presented the warrant for payment; and under those circumstances the county paid this warrant. It is true that it has been held, under certain circumstances, as is said in 1 C. J. 562, as follows: "When a claim is disputed * * * and the tender of a check or draft in settlement is of such character as to give the creditor notice that it must be accepted in full satisfaction of the claim or not at all, the retention and use thereof by the creditor constitute an accord and satisfaction. And it is immaterial that the creditor * * * protests that he does not accept the tender in full satisfaction of the claim. If he is not willing to accept the check in full payment, it is his duty to return it." But this also is said in the same valuable work (1 C. J.), at page 560: "Although the debtor has made his tender conditional on acceptance in full satisfaction of a larger disputed claim, he may, nevertheless, waive the condition and consent to the creditor receiving it on his own terms, and, when he does so, acceptance of the amount tendered does not operate as a satisfaction of the claim." The county, by the payment of the warrant after notice of the terms on which

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Mr. Lee proposed to collect it, waived the condition contained in the stipulation aforesaid. The expense warrant incident, therefore, did not constitute an accord and satisfaction, or even an accord.

What occurred between Mr. Lee and the board at its October 18th meeting was an accord, under the statute on the subject, although it would not have been so at common law. But the execution of an accord, while it is in existence, is as much necessary to constitute an accord and satisfaction as the accord itself. This accord consisted in Mr. Lee's agreement to accept, not the warrant (merely a promise to pay), in satisfaction of all demands, but the money, the actual payment. (1 R. C. L., pp. 199-200.) Before the money was paid, and even before the warrant was issued Mr. Lee withdrew his proposition to accept the $1,000.00 in full satisfaction, as having been made upon a misconception on his part of the reason for the conduct of the board, at which he felt incensed at the time the proposition was made, and gave express notice to the board of such withdrawal at its November 15, 1920, meeting, when he, along with Mr. Howard, asked the board to reconsider its action at the October 18th meeting, and grant a rehearing of the matter which, as aforesaid, the board did at the November 15th meeting. Since there was never any claim on the part of the county that it did not owe the whole $1,000.00 to Mr. Lee for services rendered under the original contract, which did not embrace the services in question, his agreement to accept the $1,000.00 in full satisfaction of all of his demands was *nudum pactum*, so that he had the perfect right to withdraw his agreement at the time he did. When the board thereafter acted as it did, by the resolution of November 15th, its action was not in execution of any accord with Mr. Lee, because that accord had been withdrawn, as aforesaid. Similarly, when, after the appeal had been taken from the last-named action of the board, of which the county had notice at the time as the statute on that subject re-

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quires, the county paid the $1,000.00 warrant to Mr. Lee, it was not in execution of any accord with him, either under the statute, section 5765 aforesaid, or at common law, because no such accord was then in existence; and this the county well knew at the time it made such payment.

The circumstances relied on by the county as having the effect of an accord and satisfaction which barred the demand of Mr. Howard consist merely of his acceptance of the payment of the $1,000.00 warrant issued to him after the appeal aforesaid had been taken as aforesaid. There was no evidence before the jury that such payment was made in pursuance, either of any express agreement on the part of Mr. Howard, that it would be received in full satisfaction of his demand which is in question, so as to bring the case within the statue (section 5765), or of an implied agreement to that effect, which would leave the case stand as at common law. And, under the principle above adverted to, the county, by the payment of the warrant to Mr. Howard for the $1,000.00 after notice of the terms on which he would alone accept it, waived the aforesaid condition contained in the warrant itself. 1 C. J. 460. Hence. neither under the statute, nor at common law, was there any accord and satisfaction which barred the claim of Mr. Howard.

Upon the whole case, after careful consideration thereof, we are of opinion, notwithstanding the errors above noted committed on the trial, that "it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits, and substantial justice has been done." Hence, under the statute (section 6331 of the Code), the case will be affirmed.

PRENTIS, J., dissenting.

Affirmed.

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DIRECTOR GENERAL OF RAILROADS (VIRGINIAN RAILROAD) *v.* BROWN.

(*Wytheville, June 15, 1922.*)

1. RAILROADS—Collision at Crossing—Negligence—Contributory Negligence—Duty to Look and Listen—Evidence—Ordinary Care—Warning of Approach of Train—Instructions—Duty to Stop Before Crossing Railroad—Instructions to Disregard Evidence—Contributory Negligence—Code, secs. 6092, 6104.

Error to Circuit Court of Greensville county.

Affirmed.

Walter C. Plunkett, Williams, Loyall & Tunstall, and *Hall, Wingfield & Apperson,* for the plaintiff in error.

Jno. N. Sebrell and *E. Peyton Turner,* for the defendant in error.

KELLY, P.:

This is an action by C. M. Brown against the Director General of Railroads, operating the Virginian Railroad, for damage to a motor truck caused by a collision with one of the defendant's freight trains at a public crossing. There was a verdict and judgment for the plaintiff, and the defendant assigns error.

The accident occurred in the daytime, just west of Jarrett, an unincorporated village. At the crossing, and for some distance in each direction therefrom, the defendant maintained four parallel tracks, which, counting from north to south, were, respectively, designated as the "team track," the "storage track," the "pass track," and the "main track." When the collision occurred, the truck was moving south on the public road, and the train was moving west on the pass track. In each direction from the crossing for a long distance the tracks are perfectly straight, but at the time of the accident the view of the pass track and the main track each way, for one coming south over the crossing was

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entirely cut off by long lines of coal cars which the defendant had stored or placed on the team track and the storage track. These lines of cars were separated only by the width of the crossing—that is to say, they extended right up to the crossing on each side. The space between the team track and the storage track is about twenty-five or thirty feet, and between the storage track and the pass track about eight feet. The train, which had come from the east and had run in on the pass track, stopped at Jarrett station, east of the crossing, long enough (just how long does not appear) to load and unload some local freight, and, having dropped the caboose on a siding, was proceeding west on the pass track for the purpose of placing some cars on one of the other tracks at a point west of the crossing. The train at that time was composed of some fifteen or twenty cars and had attained a speed of twelve or fifteen miles an hour, and the engine was within not less than seventy, nor more than one hundred, feet of the crossing when the truck passed the end of the stationary coal cars on the storage track and thus reached a point where the truck driver and the engineer could see each other. Until this moment, the engineer could not see the truck, and, according to the plaintiff's witnesses, the truck driver could not see the engine, although there is evidence for the defendant (evidently rejected by the jury) tending to show that the smoke stack and top of the cab was in the line of the driver's vision over the top of the coal cars. The driver of the truck was moving so slowly that, within the few feet available to him after seeing the engine, he was able to stop the truck before its front wheels quite reached the north rail of the pass track, and he attempted to back away, but his reverse gear did not work promptly, and he failed in this attempt. Whether the engineer did all he should have done to avoid the collision is a question on which there is some conflict in the evidence. However this may be, the engine struck the bumper or the front springs on the truck,

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pushed or knocked it along the track a distance of something like twelve feet, and at that distance beyond the crossing came to a full stop. The truck was seriously damaged, but the driver and a colored boy who was riding with him both escaped without injury, and the truck itself was able to leave the scene under its own power.

The testimony of the driver and the boy with him was to the effect that they were familiar with the crossing; that the conditions prevailing that day with reference to the coal cars on the tracks were usual at that point; that they did not stop, but slowed up, looked and listened for a train, saw and heard none, and proceeded at slow speed (about four miles an hour) across the first two tracks, continuing to look and listen until they came in view of the engine, as above stated; that the truck was running smoothly and making very little noise; that the colored boy was standing up in an effort to get a better view over the top of the coal cars; that no bell was sounded and no whistle was blown for the crossing.

The employees in charge of the train say, on the other hand, that they blew the whistle and rang the bell in full compliance with their duty in that respect, and that the engine was making steam, throwing out smoke and making considerable noise. This, however, like the evidence that the smoke stack and cab were visible over the top of the cars, was in conflict with the plaintiff's evidence and reasonable inferences therefrom, was rejected by the jury, and cannot be considered by us except in so far as it may be material to certain questions of law arising upon the instructions.

The first ground upon which we are asked to reverse the judgment is that the court erred in refusing to set aside the verdict as contrary to the law and the evidence.

In support of this contention it is urged that the plaintiff's driver, in view of his familiarity with the crossing

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and its obstructed condition, did not take due precaution for his safe passage over it.

The question is a close one. We do not say that if we were sitting as a jury and passing upon the facts of this case as they appear in type, we would find for the plaintiff. The driver could have safely stopped his truck, certainly just before he reached the team track, and perhaps between the latter and the storage track, and sent the colored boy forward to give him a signal. But would that course have been dictated by ordinary care, or would it only have been exacted by the highest degree of care?

The duty of the driver was to exercise ordinary care. This is elementary. But ordinary care depends upon the circumstances of the case, and must be commensurate with the danger. *Wash. & O. D. Ry. Co.* v. *Zell*, 118 Va. 755, 759; *Jeffress* v. *Va. Ry. & P. Co.*, 127 Va. 694, 713. This was a dangerous crossing and the driver knew it.

It must be remembered, however, that what is ordinary care in a given case is always a question to be determined by the jury, if the facts are such that fair-minded men might reasonably differ upon the question. What would a man of ordinary prudence have done under the circumstances of this case? The driver and his companion knew in advance, and were bound to observe at the time, that the view at the crossing was obstructed. But it does not clearly appear that they might not have supposed that they would be able to hear a train or see an engine or its smoke over the top of the cars. Indeed, witnesses for the defendant testified that this very thing could have been done at that time, and the defendant relied upon that evidence in the defense of this action. To be sure, the jury found as a fact that the driver and his companion could not hear the train or see any part of the engine, or the smoke from the engine, but it does not seem unreasonable to assume that persons undertaking to cross in an automobile might, in advance of the actual experiment, have supposed that if there

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was a train on the other side of the coal cars they would be able to see it or hear it before reaching one of the unobstructed tracks. Can we say, in view of the evidence as a whole, that the plaintiff's driver was bound to know, in the exercise of due care, that the looking and listening which he was doing would be ineffective? We think not. He slowed down, ran cautiously and continued to look and listen. He had reason to expect that the train, if near, would give some signals of its approach. If the latter had been done by the defendant's employees, the driver would have been warned, and the accident in all probability would have been avoided. This, at least, is one view which reasonable men might take of the situation.

The case of *U. S. Spruce Lumber Co.* v. *Shumate*, 118 Va. 471, is cited by the defendant, and the contention is made that the decision therein conclusively shows that there could be no recovery in the instant case. Such is not our interpretation of that decision. The demurrer was sustained in the *Shumate Case* because the declaration showed that the precautions taken by the plaintiff were wholly and necessarily ineffective, and that he thereafter neglected to look for a train, notwithstanding his subsequent opportunity to do so effectively before entering the track. He stopped at a place where he could only have made looking of avail by leaving his buggy and going forward to a point at which his view would not be obstructed; but without doing that, and without looking again after he had passed the obstruction, he proceeded without further precaution to cross the track. As was said by Judge Cardwell, who delivered the opinion of the court: "The inference necessarily to be drawn from the facts stated is that the plaintiff either did not look for the approaching train before going on the railroad track, at a point after passing the obstructions from which he could have seen, had he looked, the engine and car which struck the buggy in which he was riding, or upon passing the obstruction the approaching engine and car was

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seen and the occupants of the buggy recklessly undertook to cross the track before the car reached the crossing, in either of which events the contributory negligence of the plaintiff would bar his recovery in this action."

In *Purcell* v. *Wash. & O. D. R. Co.*, 132 Va. —, 25 Va. App. —, 111 S. E. 300, 302, we said: "The gist of the decision in the *Shumate Case,* in so far as that decision is here involved, is that when a traveler on a highway undertakes to cross a railroad track, he must look and listen at such time and place as will make looking and listening effective, and that, if his allegations or proof show that he looked and listened where looking and listening would do no good, he makes a case of negligence on his own part, provided his failure to more effectively look and listen is 'unexplained.' "

The case of *Wash. & O. D. Ry. Co.* v. *Zell,* 118 Va. 755, is also relied upon by the defendant, but we do not think it is in point here. In that case there was nothing to indicate that the occupants of the automobile exercised any care whatever, or looked or listened at all, notwithstanding the fact that they had ample opportunity to do so.

In *Southern Ry. Co.* v. *Bryant,* 95 Va. 212, 219, Judge Riely, in delivering the opinion of the court, said: "It is without doubt a general rule that a person about to cross a railroad track—even at a public crossing—must exercise ordinary care and prudence. He must use all his faculties to avoid danger. He should both look and listen. He should look in each direction from which a train could come, and if not in sight, listen for its approach. And if warned by his faculties of the near approach of a train, it is his duty to keep off the track until it has passed by, or no recovery can be had for any injury he may sustain. This is the unquestioned law in every jurisdiction of which we are aware. *Johnson* v. *Chesapeake & O. R. Co.*, 91 Va. 179, and the authorities there cited.

"But while this is the general rule, it is not inflexible, nor wholly without exception. It would be unreasonable to

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require a traveler, upon approaching a railroad crossing over a highway to look, when, by reason of the nature of the ground or other obstruction, he could not see; in other words, when compliance with the general rule would be impracticable or unavailing. Where the view of the track is obstructed, and the railroad company has failed to give notice of the approach of its train to a crossing upon the highway, and a person in attempting to go across the track, not being able to see the train on account of obstructions, and being obliged to act upon his judgment at the time of crossing, is injured, the propriety of his going upon the track under such circumstances is not a question of law to be decided by the court, but a matter of fact to be determined by the jury. 2 Wood on Railroads, p. 1527; Beach on Con. Neg. (2nd Ed.), sec. 196; *Norfolk & W. R. Co.* v. *Burge*, 84 Va. 68; *Smedis* v. *Brooklyn, etc., R. Co.*, 88 N. Y. 13, and *Ormsbee* v. *Boston, etc., R. Co.*, 14 R. I. 102."

In *Southern Ry. Co.* v. *Aldridge*, 101 Va. 141, 146, Judge Keith, in delivering the opinion of the court, said: "This court has never decided that as a matter of law it was the duty of a person approaching the crossing of a railroad to *stop*, look and listen for an approaching train. It has been said in numerous cases that the railroad track itself was a signal of danger, and imposed upon one approaching it the duty to look and listen, but it has in no case been held that it was his duty to *stop* in order to look and listen, or that it was his duty when in a vehicle to get out in order to look and listen. On the other hand, it has been said that the degree of care and caution to be exercised depended upon the facts and circumstances of the particular case, and we have had no occasion to say that in no case would a traveler be required to *stop* in order to look and listen."

The case of *Seaboard Air Line Ry. Co.* v. *Abernathy*, 121 Va. 173, is quite similar to this one in its facts, and the principal defense relied upon was, as here, that the plaintiff was guilty of contributory negligence in attempting to drive

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his automobile across the tracks without stopping to look and listen. In that case, the public highway was intersected by three tracks of the defendant company, known as the "connection track," the "house track," and the "mill track." Abernathy was entirely familiar with the crossing and was driving his automobile over it. His view was cut off by the cars on the house track. His testimony was that when he got to the crossing the cars on each side were close up to the road; that he looked and listened all he could without stopping the automobile; that he was running as slow as he could without stopping; that he looked for a train and then looked over the cars to see if he could see any smoke; that when he got to the connection track the car which struck him was within six feet of him and there was no chance for him to get out of the way, and that he saw the car as soon as there was any possible chance of seeing it.

To show the pertinency of what the court said in the *Abernathy Case* to the defense in the instant case, we quote briefly from the petition upon which the present writ of error was granted, as follows: "The driver testified that he was driving only about four miles an hour; that his truck was making some noise, but very little. Had he stopped and listened, either on the team track or storage track, in the nature of things, he was bound to have heard the approach of the train."

In dealing with a similar contention in the *Abernathy Case*, Judge Prentis, speaking for this court, said: "In this case, counsel for the company appear to base their charge of contributory negligence imputable to abernathy on his failure to stop upon the house track between the stationary cars in the opening made in the train for the purpose of permitting travelers to cross that track, for this was the only place at which he could possibly have stopped and had any view of the detached cars approaching on the connection track. Doubtless, if he had stopped upon that house track for the purpose of making such an investigation and been injured

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because these cars were brought together suddenly, a demurrer to the evidence would have been sustained upon the ground that thre can hardly be a more dangerous place for an automobile to stop than on a railroad track between cars recently uncoupled for the purpose of opening the highway.

"There were only eight feet six inches between the inside rails of the two tracks, and by the time the driver of the automobile had cleared the overhang of the cars upon the house track, the front of his machine must have been upon the connection track, or so close thereto as to expose him to extreme danger. If, however, he had stopped his car before getting upon the house track and gone forward to observe the condition of things upon the connection track and found the crossing apparently safe, by the time he had again started his automobile and attempted to cross, a dangerous situation might have developed—indeed, an accident similar to this very accident might have occurred. Under these circumstances, it seems to be peculiarly appropriate that the question as to whether or not the plaintiff was guilty of contributory negligence should have been submitted to the jury, and certainly it would have been error for the lower court to have told the jury as a matter of law that the plaintiff should, within the space of less than eight feet six inches, have been able, while his car was slowly moving, to look in both directions and stop in time to have avoided the accident."

We do not overlook the fact that, unlike the *Abernathy Case*, the driver in this case was accompanied by a boy who could have gone forward and piloted him safely across. But the defendant, who knew even better than the driver that the crossing was usually blocked, kept no flagman there, and probably assumed as he did that the crossing required no such precaution.

Cases may and do arise in which the courts properly hold that undertaking to cross a railroad track without stopping

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to look and listen is negligence which, as a matter of law, bars a recovery. As Judge Cardwell said in the *Shumate Case, supra,* such conduct "is, if unexplained, contributory negligence *per se* as a matter of law." In this case an explanation is offered. The driver did not stop, but he reduced his speed to about four miles an hour, looked and listened as effectively as he could have done if he had stopped, and perhaps acted as an ordinarily prudent man would have done in attempting to cross the tracks.

Under the circumstances as disclosed by the evidence we have reached the conclusion that upon the question of contributory negligence there is room for a fair difference of opinion, and that the case is not controlled by the principles announced in the *Shumate* and *Zell Cases,* but rather by those laid down in *Southern Ry. Co.* v. *Bryant, supra,* and *Seaboard Air Line Ry. Co.* v. *Abernathy, supra.*

It is next insisted that the court erred in refusing to give defendant's instruction No. 6, which was as follows: "The court instructs the jury that if they believe from the evidence that the cars which were on the tracks parallel to the tracks on which the accident occurred were so placed that they obstructed the view of George Brown, the driver of the truck, to such an extent that he could not see the approaching train without stopping, then it was his duty to stop in a place of safety and use reasonable care to ascertain if a moving train was upon said track, and if they believe from the evidence that it was necessary for him to stop and get out of the truck in order to see, and he failed to stop and get out of the truck, then they shall find for the defendant."

This instruction did not correctly state the law as applied to the evidence in the case. It dealt solely with the question of vision, and would have told the jury in effect that if they believed from the evidence that it was necessary for the driver to stop and get out of the truck in order to see the train, and he failed to stop and get out, they must find for

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the defendant. It thus amounted plainly to a peremptory instruction for the defendant, because it directed a verdict in defendant's favor if the plaintiff could not see the train from the truck, and the evidence shows beyond dispute that, whatever the driver may have thought of the situation before he made the experiment, his view of the pass track and of the train thereon was in fact absolutely cut off. The instruction ignored and excluded from the jury any consideration of the driver's caution in running slowly, listening for a train, and depending upon signals from the bell and the whistle, which it was the defendant's duty to give. If there had been evidence tending materially to show that the noise of the motor or of the gear or wheels of the truck, or outside noises (as, for example, of a nearby mill or rock crusher) would have made listening of no avail, and the instruction had properly embodied a reference to such evidence, then the defendant would have been entitled to an instruction submitting to the jury the question whether the driver ought, in the exercise of due care, to have stopped and gone or sent ahead; but under the evidence as it was, the instruction, especially in the form as offered, was properly refused.

The remaining assignment charges that the court erroneously instructed the jury to disregard all of the defendant's evidence bearing upon the question of contributory negligence.

Section 6092 of the Code provides as follows:

"If the defendant in any action of tort intends to rely upon the contributory negligence of the plaintiff as a defense to the action, he shall so state in writing before the trial begins, giving the particulars thereof as fully as the plaintiff is required to state the negligence of the defendant in his declaration, or bill of particulars, but the defendant shall not be precluded from relying upon the contributory negligence disclosed to the defendant by the plaintiff's testimony."

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The original of this statute (Acts 1916, page 506) provided that if the defendant intended to rely on contributory negligence of the plaintiff as a defense to an action for personal injuries, "then, upon motion, such contributory negligence shall be set forth in a bill of particulars, etc." The revisers of the Code changed this, and the statute now makes the filing of the statement in any action of tort, independent of a motion by the plaintiff or a direction by the court, a condition precedent to the defense of contributory negligence, except as disclosed by the plaintiff's testimony.

The learned counsel for the defendant insists, in the first place, that the plaintiff waived his right to rely on the statute in question by failing to object to certain evidence introduced by the defendant tending to show contributory negligence on his part. The evidence here referred to was that the smoke stack and part of the cab of the engine projected far enough above the top of the stationary cars to enable the driver to discover the presence of the train, and that the engine was emitting smoke and making noise to such an extent as that the driver, in the exercise of due care, could and would have seen and heard enough to warn him of the approaching train. The plaintiff did not object to any of this evidence, and it is argued that the failure to object operated as a waiver of the benefit of the statute.

This position is not tenable. The meaning of the statute is plain. Its clear purpose is to cut off the defense of contributory negligence in the absence of the required statement in writing, except in so far as that defense may be based upon facts disclosed by the plaintiff's testimony. We need not here decide whether the statute could be waived, because there is nothing in this case from which a waiver can fairly be inferred. So far as appears, there was nothing in the offer of the evidence in question which necessarily put the plaintiff on notice that it was intended primarily to support a claim that the plaintiff was guilty of contributory negligence. The declaration charged that the defendant had

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obstructed the view of the track by coal cars, and had operated its train without warning of any kind to the plaintiff. These were charges of primary negligence, and evdence as to the height of the smoke stack, the discharge of smoke therefrom, and the noise of the engine was admissible in rebuttal of such charges and of the plaintiff's evidence to sustain them—as much so, for example, as would have been evidence tending to show that there were no cars at all, or only very low flat cars standing on the tracks. Being clearly admissible for this purpose, we cannot say that the plaintiff must have understood and impliedly agreed that the evidence was introduced for the further purpose of showing contributory negligence. The statute is mandatory, and the situation as presented by the record is lacking in any such evidence of notice to and intention by the plaintiff as to create a waiver. *Cary* v. *Insurance Co.*, 127 Va. 236, 246; *A. C. L. R. Co.* v. *Warrington,* 129 Va. 331, 340-41.

There being no compliance with or waiver of the statute, the defendant was limited in its defense to (1) the failure of the plaintiff to show by a preponderance of evidence that the injury was proximately caused by the negligence charged in the declaration, and (2) to the contributory negligence of the plaintiff as disclosed by his own testimony.

These defenses were fully and fairly submitted to the jury. By explicit instructions given at the defendant's request, they were told that the burden was on the plaintiff to prove the negligence charged in the declaration by a preponderance of the evidence, and that such negligence was the efficient and proximate cause of the accident.

Nothing in the other instructions in any way cut off or restricted the defendant's right and opportunity to rely upon either of the two defenses to which it was entitled. But for the statute a third defense would have been available to it, namely, the plaintiff's contributory negligence as disclosed by the defendant's evidence. All that the instructions complained of did was to follow the statute and exclude any re-

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liance on the last-named defense. They did not, as contended by counsel for the defendant, exclude from the jury a due consideration of evidence which it introduced and had the right to introduce on the general issue in defense of the charges in the declaration. These charges, as the jury were plainly told, had to be proved by a preponderance of proof on the part of the plaintiff, and in passing upon the weight of the evidence as to such charges they were obliged to consider that which had been offered by the defendant. The instructions in this respect were so plain that the jury could not have misunderstood them.

The conclusion of the whole matter upon this branch of the case, as we see it, is as follows: The plaintiff, having charged the defendant with negligence in obstructing the view of the tracks and carelessly operating its train over the crossing without warning, introduced proof tending to sustain each of these charges. The defendant failed to comply with section 6092 of the Code, but introduced proof in conflict with that of the plaintiff tending to show that it had not done any of the acts of negligence with which it was charged. There were circumstances disclosed by the plaintiff's evidence from which his contributory negligence might be inferred, and there also appeared in the defendant's evidence further circumstances which, if believed by the jury, would have strengthened the defense of contributory negligence. The court told the jury to find for the defendant unless they believed from a preponderance of the evidence that the negligence charged in the declaration was proved, and was the proximate cause of the injury, and also told them to find for the defendant if they believed from the plaintiff's testimony that he was guilty of contributory negligence, but that as to the last defense they could not consider the evidence introduced by the defendant. This was the law of the case, and we find no error in the instructions.

It is insisted, in the very able brief of counsel for the defendant that the plaintiff's alleged contributory negligence

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in stopping to look and listen was, for the first time, "disclosed to the defendant by the plaintiff's testimony," and that nothing in the statute prohibited it from following up the defense thus disclosed by a development of all the facts with reference thereto. It is said that any other construction of the statute would be intolerably unfair.

This argument is plausible, but not sound. There are few negligence cases in which the defendant does not possess sufficient knowledge of the salient facts far enough in advance of the trial to determine whether the defense of contributory negligence will be invoked. In the few cases where this is not true, and in all cases in which the particulars of the defense are not stated as fully as they would have been but for some serious surprise to the defendant in the plaintiff's evidence, the ends of justice can be met in the trial court, as conditions may require, either by a continuance of the case to allow an original compliance with the statute or by an amendment of the statement of grounds of defense already filed, with or without a continuance, as may be proper. We have no doubt that one of the courses here suggested could be taken in any proper case under the liberal interpretation which we have held should be placed on section 6104 of the Code. As a general rule, section 6092 will only harm the defendant where a compliance with its terms has been overlooked.

Interpreted and administered as contended for by the defendant in this case, the statute would be susceptible of abuse, and might often force the plaintiff, after relying on the defendant's failure to comply therewith, to meet an unexpected issue. If it be said that such a result could be avoided by according the plaintiff in a proper case time and opportunity to meet the issue, the answer is that this would be an inverted administration of the statute, the primary purpose of which was to impose a limitation on the defendant.

For the reasons stated, the judgment is affirmed.

Affirmed.

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DIRECTOR GENERAL OF RAILROADS (CHESAPEAKE AND OHIO RAILROAD) *v.* GRAVINS.

(*Wytheville, June 15, 1922.*)

1. SLANDER—Declaration—Demurrer—Publication of Alleged Slander.
2. INSULTING WORDS—Code, sec. 5781—Object of Statute—Insults Privately Given—Liability of Railroad Corporation for Act of Agent—Scope of Authority—*Respondeat Superior*—Ratification—Compensatory and Punitive Damages.
3. APPEAL AND ERROR—Form of Judgment—Code, sec. 6365—Action for Isnulting Words—Failure to Prove Actual Damages—Consent of Government to Sue Director General.

Error to Hustings Court, Part II, of city of Richmond.

Reversed.

D. H. & Walter Leake and *Sherlock Bronson,* for the plaintiff in error.

Bethel & Williams and *M. J. Fulton,* for the defendant in error.

PRENTIS, J.:

This is an action for slander and insulting words under the Virginia statute, in which there was a verdict and judgment against the Director General of Railroads in favor of W. F. Gravins.

The case must be considered in two aspects, because it is necessary to observe the distinction between the common law action for slander and the action given in Virginia by statute for insulting words.

1 }

1. The first count of the declaration charged common law slander. Omitting the introductory statements, this count charged that the defendant "maliciously, wickedly and falsely uttered and published of and concerning the said plaintiff, and of and concerning him in his trade and business, the following scandalous and malicious and defamatory words—that is to say, the said defendant, by and through

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the said G. A. Warthen, his general agent, agent, servant and employee, acting within the general or apparent scope of said Warthen's employment and in the furtherance of defendant's business, or incidental thereof, or within the actual or apparent scope of said Warthen's employment, or authorized expressly or impliedly or approved or ratified expressly or impliedly by said defendant, did say: 'I' (meaning him—G. A. Warthen, general agent, agent, servant and employee of said defendant) 'am not thoroughly convinced that you' (meaning W. F. Gravins) 'did not send the man' (meaning the man who stole the eggs) 'to the car' (meaning the railroad car of defendant) 'to get the eggs' (meaning the eggs stolen from the car), 'and the man' (meaning the man who stole the eggs) 'bring them to your store' (meaning the store of W. F. Gravins) 'and you' (meaning W. F. Gravins) 'filed claim for them' (meaning W. F. Gravins filed claim for the value of the eggs). Meaning that W. F. Gravins, the plaintiff, was a crooked and dishonest person, and that he, W. F. Gravins, sent the man who stole the eggs from the car, and had him bring the eggs to his store, and that he, Gravins made claim for the same against defendant."

There was a demurrer to this count as well as to the other two and to the entire declaration, which was overruled by the court.

Referring now alone to this count, we think it only necessary to consider one of the grounds alleged in the demurrer, and that is that the count is fatally defective because it fails to allege a publication of the alleged slander.

We think it needs no citation of authority to show that the words charged, with the inducement, colloquium, imputation and innuendoes, constitute common law slander. It is necessary, however, also, in order to sustain a recovery for slander at common law, to allege and prove that there was a publication. *Stivers* v. *Allen*, 115 Wash. 136, 196 Pac. 663, 15 A. L. R. 247, 17 R. C. L. 315. Bearing these

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principles in mind, we observe that the declaration does not follow the usual form and allege that the slander was published in the presence and hearing of, or to any other person than the plaintiff. It does, however, allege a publication. Whether or not this alone is sufficient, it is unnecessary to determine. *Sun Life Assurance Co.* v. *Bailey*, 101 Va. 445, 44 S. E. 692. It is certainly true that the defendant was ultimately entitled to know to whom the slander was published; but this information he could have secured by a motion to require the plaintiff to file the particulars of his claim. Whether overruled or sustained, however, the demurrer does not dispose of the question in this case, because it was again raised after the evidence was introduced. and it clearly appears from the plaintiff's own testimony that in the angry colloquy which occurred between the plaintiff and Warthen, the general agent of the defendant, no one was close enough to them to hear the offensive words. It clearly appears, therefore, that there was no publication of the alleged slander.

The necessity for showing such publication seems to have been ignored during the trial, because, notwithstanding the indisputable fact that the alleged slanderous words were never spoken or published of the plaintiff to any one other than himself, the court, in the admission of the testimony and in the giving and refusing of instructions, appears to have allowed the trial to proceed upon the theory that no publication was necessary. For this error, which pervades the entire proceedings, the case must be reversed. The defendant is entitled to a judgment here in his favor upon the count charging the common law slander, and this without reference to any of the other questions which are raised.

2. There were, however, two other counts in the declaration, under the Virginia statute (Code 1919, sec. 5781), which provides that, "All words which, from their usual construction and common acceptation, are construed as insults and tend to violence and breach of the peace shall be

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actionable. No demurrer shall preclude a jury from passing thereon." The briefs contain an elaborate discussion in support of the contention that publication is also required in order to entitle a plaintiff to recover for insulting words, as in common law slander. It may be conceded that there is much in favor of this view. We have recently, however, after careful deliberation, in a previous case—*Davis* v. *Heflin*, 130 Va. —, 23 Va. App. 98, 107 S. E. 673—determined otherwise, and believe the conclusion there reached to be sound. In *Rolland* v. *Bachelder*, 84 Va. 673, 5 S. E. 695, the same view was expressed.

When the history of the statute is recalled, and it is observed that its purpose was so to extend the common law as to give a right of action for insulting words, even though containing no imputation which was actionable at common law, the reason for the rule of *Davis* v. *Heflin*, to which we adhere, seems to us apparent. The design of the statute is to prevent breaches of the peace, to discourage offensive and excessive freedom in the use of that unruly member—the tongue—to inflict punishment therefor, and by subjecting those who are so hasty of temper and inconsiderate of the feelings of others as to insult them to such actual and punitive damages as may be awarded by a jury. The purpose of the statute would be in a measure defeated, and breaches of the peace would be encouraged rather than discouraged, by holding that no action would lie thereunder for insults privately given. The statute is peculiar, as we believe, to Virginia and Mississippi, and while most of the rules applicable to common law slander are now applicable to this action, the rule requiring publication is not applicable. Considered from this point of view alone, we are of opinion that the court did not err in overruling the demurrer to the second and third counts of the declaration.

Warthen, who uttered the words complained of, was not sued, and it must be remembered that there may be some liability upon him which could not be imposed upon the

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Director General, who was sued. If the liability of the Director General is identical with that which would have attached to the railway corporation before he took possession, then there is no doubt that, by the great weight of authority, if Warthen was acting within the scope, or within the apparent scope, of his authority, then his principal is liable upon the doctrine of *respondeat superior* to the plaintiff.

While there are cases of high authority which distinguish between the liability of a corporation for libel and for slander, holding that a verbal defamation is so personal that a corporation is only liable for a slander uttered by its agent where it had actually authorized, or subsequently ratified. his utterance, the whole trend of judicial opinion in the more modern cases is to disregard such a distinction as unsound and based upon no sufficient reason.

Among these cases is *Rivers* v. *Yazoo & Miss. Val. R. Co.*, 90 Miss. 196, 43 South. 471, 9 L. R. A. (N. S.) 931, in which a corporation is held liable for slander, where it was shown that the agent was acting in the scope of his employment and in the actual performance of the duties of the corporation touching the matter in question; and a plea which, set up by way of defense, that it did not appear that the corporation had knowledge that the slanderous words had been uttered or published, that they were not uttered with its approval or consent, and that they had never been ratified, was overruled.

So also, in *Hypes* v. *Southern Ry. Co.*, 82 S. C. 315, 64 S. E. 395, 21 L. R. A. (N. S.) 873, the defendant was held responsible for a slander uttered by the division superintendent while examining the time account of an engineer, charging him with stealing from the company, upon the ground that it was in the course and scope of his employment and under the implied authority of the corporation. *Kane* v. *Boston Mut. L. Ins. Co.*, 200 Mass. 265, 86 N. E.

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302; *Empire Cream Separator Co.* v. *De Laval Dairy Supply Co.*, 75 N. J. L. 207, 67 Atl. 711.

In *Roemer* v. *Jacob Schmidt Brewing Co.*, 132 Minn. 399. 157 N. W. 640, L. R. A. 1916-E 774, it is held that the liability of a corporation for a slander uttered by its agent is governed and determined by the same rule which determines its liability in the case of libel published by such agent, and it is responsible for a slander uttered by said agent in the course of his employment and in the furtherance of business engaged in by the corporation; and other modern cases are cited in a note to this case—L. R. A. 1916-E 774. *Grand Union, etc.*, v. *Lord*, 231 Fed. 392. There is a *dictum* to the same effect in *Sun Life Ins. Co.* v. *Bailey*, 101 Va. 446, 44 S. E. 692.

That Warthen was thus acting within the actual and apparent scope of his authority is manifest. The plaintiff was in the habit of receiving carload shipments of eggs. He had complained on the 4th of September that apparently twenty-one crates of eggs had been stolen from a car belonging to him, then on the railroad yard to be unloaded. The suspicion of the Director General's agents had also been aroused by the fact that a colored driver had been seen to go to the car and unload some of the eggs, but as they were not sure that this man was not one of Mr. Gravins' drivers, they did not stop him. This circumstance was being investigated by King, the chief special agent of the carrier, and the thief was soon thereafter caught and convicted. Gravins then thought that twenty-one cases had been taken, but when the car had been fully unloaded he discovered that only eight cases were missing. He thereupon, on September 5th, went to Warthen's office to obtain what is spoken of as a bad-order or shortage ticket for the eight crates of eggs to form the basis of his claim against the defendant for the value of the eggs which had apparently been stolen. Warthen was not charged with the duty of personally issuing these bad-order or shortage tickets, but one of his immediate

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subordinates was, and such tickets were signed in Warthen's name. Warthen's claim in the discussion arising as to the circumstances related, was that after the car was delivered to the consignee his principal ought not to be held responsible for theft therefrom. Warthen and Gravins met just outside of the office, when an angry colloquy resulted, though the great weight of testimony shows that Gravins, especially after he alleges that Warthen uttered the offensive words, became excited and violent in manner, that his words were loud and angry, and in the highest degree insulting to Warthen, whereas Warthen was more quiet in manner, and what he said to Gravins was said in a quiet, restrained tone, and was heard by no one else except Gravins.

These being the circumstances, there can hardly be any fair doubt that Warthen was acting within the apparent scope of his authority.

We are urged to hold that, whatever would be the rule, if Warthen had been acting as the agent of the railroad company, this rule should not be applied to the Director General. There is some authority for this view, but we believe that the weight of authority and the better reason is the other way, and that the statute indicated the intention of the Congress, which was effectuated by the proclamation of the President, through the Director General, based upon the act of Congress, to preserve to the public substantially every right of action against the Director General for compensatory damages which theretofore existed against the corporations.

Section 10 of the federal control act (Comp. St. Ann. Supp. 1919, sec. 3115¾-j), among other things provides: "That carriers, while under federal control, shall be subject to all laws and liabilities as common carriers, whether arising under State or federal laws, or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control, or with any order of the President. Actions at law or suits

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in equity may be brought by and against such carriers, and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. * * * But no process, mesne or final, shall be levied against any property under such federal control."

Pursuant to that statute, what are known as general orders Nos. 50 and 50A were promulgated, of which the pertinent part here involved reads thus: "Whereas, since the Director General assumed control of said system of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during federal control, for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of federal control should be brought directly against the said Director General of Railroads and not against said corporations; it is, therefore, ordered that actions at law, suits in equity and proceedings in admiralty hereafter brought in any court, based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit or proceeding, but for federal control, might have been brought against the carrier company, shall be brought against the Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to suits, actions, or proceedings for the recovery of fines, penalties and forfeitures."

The conclusion from a fair consideration of the circumstances and of this language is, that the act of Congress and the proclamation were to interfere little with the accus-

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tomed processes of the courts during the period of federal control, and to subject the Director General to the same general liabilities to which the railroad corporations would have been subjected but for that act, expressly denying, however, the right to levy on or against any of the property used while under the control of the federal government. and also relieving the Director General from all liability in actions, suits or proceedings for the recovery of fines, penalties, or forfeitures. In this we are confirmed by these clear expressions of the Supreme Court of the United States in the *Ault Case,* hereafter cited: "The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President, except in so far as such rights or remedies might interfere with the needs of federal operation." * * *

"The government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liability ordinarily incident to the operation of the carriers. The situation was analogous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore, with the whole personnel subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but property in the hands of the President for war purposes was not to be disturbed. With that exception, the substantial legal rights of persons having dealings with the carriers were affected by the change in control." Such actions, in substance and effect, are against the United States. *Bailey* v. *Hines, Dir. Gen.,* 131 Va. —, 24 Va. App. 420, 109 S. E. 740; *Westbrook* v. *Director General,* 263 Fed. 211; *Blevins* v. *Hines, Dir. Gen.,* 264 Fed. 1005.

This construction has been uniformly applied, with one exception, so far as we are informed, though the facts of that case are not given. This exception is *Dougherty* v.

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Payne, Director General of Railroads (So. Dist. Fla.), 276 Fed. 451, where it is held that an action for malicious prosecution cannot be maintained against the Director General of Railroads, as such, for the act of one of the employees of the railroad system under his control. No reason for this conclusion is given in this opinion, and the facts of the case are not stated. We observe that in *Neely* v. *Payne, Dir. Gen.* (Miss.), 89 South. 669, an action for alleged slander and libel against the Director General, was maintained, though a verdict in favor of the defendant on the issues of fact submitted was affirmed.

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3. This record presents still another proposition. No actual damages were proved, and the court gave several instructions, authorizing the jury to impose punitive damages upon the defendant. The amount of the verdict, $5,000, indicates that they have done so.

In the case of *Missouri Pacific R. Co.* v. *Ault,* 256 U. S. 65 L. Ed. —, 41 Sup. Ct. 593, there are expressions which indicate that in no event can punitive damages be imposed upon the Director General. The precise question there involved was, whether or not an Arkansas statute, which provided for the recovery of a penalty from railroad companies for delay in the payment of wages justly due employees, who had been discharged or refused further employment, was valid against the Director General. The act required the rate of wages theretofore paid to be paid from the date of discharge until payment, as a penalty, and under that statute an employee had recovered as wages $50, and $390 in addition thereto as the statutory penalty. The Supreme Court of Arkansas (140 Ark. 572, 216 S. W. 3) affirmed the judgment of the trial court, and the case was taken to the Supreme Court of the United States by writ of error. In deciding that the Director General could not be subjected to this penalty, the court said: "The purpose for which the government permitted itself to be sued was compensation, not punishment. In issuing general order No. 50, the Di-

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rector General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order: 'Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties and forfeitures.'

"Wherever the law permitted compensatory damages they may be collected against the carrier while under Federal control. Such damages may reasonably include interest and costs. See *Hines* v. *Taylor* (Fla.), 84 South. 381. But double damages, penalties and forfeitures which do not merely compensate, but punish, are not within the purview of the statute. See *Hines* v. *Taylor, supra; Jackson-Tweed Lumber Co.* v. *Southern Ry. Co.*, 113 S. C. 236, 101 S. E. 924. The amount recovered in the present case over and above the wages due and unpaid, with interest, is in the nature of a punishment. It is called a penalty in the State statute. The Supreme Court of Arkansas had held that it was not technically a penalty, declaring:

"'It is allowed for a double purpose, as a compensation for the delay, and as a punishment for the failure to pay. It is composed of all the elements and serves all the purposes of exemplary damages.' *Leep* v. *Railway*, 68 Ark. 407, 440, 441, 25 S. W. 75, 85 (23 L. R. A. 264, 41 Am. St. Rep. 109).

"But whether in a proceeding against the Director General it shall be deemed compensation or a penalty presents a question not of State, but of federal law. Whatever name be applied, the element of punishment clearly predominates and Congress has not given its consent that suits of this character be brought against the United States. The judgment against the Director General, so far as it provided for recovery of the penalty, was erroneous."

All of the cases cited in the above quotation related to statutory penalties, but, as is thereby indicated, statutory penalties are composed of all the elements and serve all the purposes of exemplary damages. Punishment of the of-

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fender as a deterrent example to others is the sole justification for awards of punitive or exemplary damages, and we are unable to perceive any distinction between penalties imposed pursuant to the common law, and those imposed by statutory sanction. The federal act prevents and supersedes the operation of the State statutes imposing penalties, and we cannot distinguish exemplary damages imposed under the Virginia statute for insulting words from other pecuniary exactions imposed as punishment under other statutes. We are of opinion, therefore, that the same rule must be applied thereto, and as the construction placed by the Supreme Court of the United States upon federal statutes is controlling, it follows that all State laws which theretofore justified the imposition of penalties were abrogated during the period of federal control of the railroads, and that the federal government has not consented to be sued therefor.

It may be urged that the penalty by way of punitive damages only attaches as incidental to a righteous claim for compensatory damages, but this does not differentiate it from the statutory penalty which was involved in the *Ault Case*. There, too, the penalty was attached to a righteous claim for a debt due the claimant, and the penalty was claimed only as an incident to such debt.

In this view, we are confirmed by the case of *Davis, Director General,* v. *Elzey* (Miss.), 89 So. 666. In that case the Mississippi court, in the same case, had previously held (88 South. 630) that punitive damages could be recovered of the Director General, but after the *Ault Case* was decided, reversed its previous decision, and in this connection said: "A careful consideration of this decision (*Ault Case*) by the Supreme Court of the United States, which is the court of final authority on this question, convinces us that we were in error, and that punitive damages may not be recovered against the government or the Director General." And the same court, in the cases of *Neely* v. *Payne, Dir. Gen.* (Miss.), 89 South. 672, and *Payne, Dir. Gen.* v. *Bartlett*

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(Miss.), 89 South. 912, reiterated its ruling and that construction of the *Ault Case.*

In *Ginn* v. *U. S. R. Administration,* 114 S. C. 236, 103 S. E. 549, an action for injury to a sick passenger, caused by exposure to a storm, it is said that "the Director General, representing the government, cannot be held to respond in punitive damages." It is also said in *Rowell* v. *Hines, Director General,* 114 S. C. 339, 103 S. E. 546, where a trespasser was injured in alighting from a train, that, "The Director General could not be sued for willfulness."

Our conclusion here, then, is that the instructions which authorized the recovery of punitive damages against the Director General were erroneous.

There is still another aspect in which this case may be considered which leads to the same conclusion. The general rule is that punitive damages cannot be recovered against a principal for a slander uttered by one of its agents, unless it has either authorized and directed the utterance by the agent or after knowledge thereof has ratified and approved it.

In this case the evidence shows just the contrary. When the plaintiff reported the occurrence complained of to Mr. George W. Stevens, federal manager of the Chesapeake and Ohio Railway Company, he, in substance, replied that, if true, Mr. Warthen should offer an apology for his aspersions upon the plaintiff. King, the special agent, was promptly sent with the plaintiff to Warthen, and in the interview which ensued, Warthen denied the utterance of the words complained of, and undertook to explain that he did not mean by the words which he actually did use to reflect upon the honesty or integrity of the plaintiff; and in substance that what he really meant was that it was impossible for him to know either whether the driver who took the eggs from the car was the agent of the plaintiff or that he did not take them to the plaintiff, but that he did not thereby mean to impute that the plaintiff would consciously con-

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nive with the driver to effect such a fraudulent purpose. There being no evidence that the federal agent or the Director General ever at any time authorized, ratified or approved the offensive charge, the instructions authorizing the recovery of punitive damages are erroneous.

The circumstance which seems to be most relied upon to show ratification is that when the plaintiff threatened suit, Warthen sent the letter to the Director General's attorney. The Director General had the right to defend the action. He has not pleaded justification, but only tendered the general issue of not guilty, and this does not afford the slightest evidence of ratification. Inasmuch as the suit was threatened against the Director General and was promptly instituted against him, this circumstance does not even tend to show ratification.

Having reached these conclusions, we must determine, under Code, section 6365, as to the judgment to be entered here. That section requires this court, when judgments are reversed in whole or in part because erroneous, to "enter such judgment, decree or order as to the court shall seem right and proper, and shall render final judgment upon the merits whenever, in the opinion of the court, the facts before it are such as to enable the court to attain the ends of justice."

In this connection we observe that in Mississippi, which has a statute substantially like the Virginia statute, making insulting words actionable, in the case of *Dixie Fire Ins. Co.* v. *Betty*, 101 Miss. 880, 58 South. 705, that court, construing the statute, held that in no event could a suit be maintained to hold a principal liable for insulting words spoken by an agent, unless possibly in a case where such words were spoken at the command of the principal, using this language: "Over the objection of the appellant, appellee was permitted to amend his declaration by adding a count predicated on section 10, Code 1906, by which certain words are made actionable. In so doing, the court com-

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mitted fatal error. This section has no application in a suit to hold a principal liable for words spoken by an agent, unless possibly such words were spoken at the command of the principal, as to which we express no opinion. Its language, together with the fact that its first appearance in our statutes was as section 9 of the act to suppress dueling, passed June 13, 1822 (Rev. Code of Laws 1824, ch. 50), demonstrates that its enactment was for the purpose of preventing personal difficulties, and that consequently it applies only to persons liable to become involved in such a difficulty by reason of having referred to another in words of the character therein mentioned."

This construction of the statute was reaffirmed in *Neely* v. *Payne, Director General, supra.*

It should doubtless be subject to the further qualification that the insulting words were neither authorized nor ratified by the principal.

While this question has never been raised in Virginia, we are greatly impressed by the reasonableness of this construction of the statute, and the expressions contained in the Virginia cases are insufficient to discredit its logic.

In *Brown* v. *N. & W. Ry. Co.*, 100 Va. 624, there was an action for libel and for insulting words under the statute, published by an agent of the defendant. The defendant demurred to the evidence and the court used this language: "This case was heard in the trial court on a demurrer to the evidence, but the plaintiff voluntarily joined in the demurrer. Whether he could have been compelled to join if the action had been brought for common law libel simply is unnecessary to decide. Section 2897 of the Code, however, provides that 'all words which, from their usual construction and common acceptation, are construed as insults and tend to the breach of the peace, shall be actionable. No demurrer shall preclude a jury from passing thereon.' The latter provision was evidently inserted for the benefit of plaintiffs in actions to which the section is applicable, and

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they have the right to waive it if they choose. Counsel for the plaintiff in the trial court, bearing in mind this statute, intended to waive the benefit of it expressly, as is manifest from his bill of exception, which states that 'after the evidence was all introduced to the jury, the defendant demurred to the testimony, and the plaintiff being willing to join therein, notwithstanding the last count of the declaration'—which was a count under section 2897 of the Code—'joined in the demurrer.' This he had a right to do." And the judgment of the trial court upon this demurrer, in favor of the defendant, was affirmed.

In *Sun Life Ins. Co.* v. *Bailey, supra,* which was also an action for libel at common law, and for insulting words under which the statute, published and uttered by an agent of the defendant, the court reversed the judgment for the plaintiff, because the jury were instructed that it was not "incumbent upon the plaintiff to prove any special damages, and if they find for the plaintiff they shall find such damages as they think he is entitled to under all the circumstances as shown in the evidence. And in ascertaining the damages they may consider the plaintiff's standing and that of the defendant." And in this connection, said: "The court had properly, in another instruction, told the jury that this action being against the defendant corporation, of which the writer of the letter sued on was the agent, they could not give punitive or exemplary damages, unless they believed from the evidence that the alleged libel of the agent was either authorized by the defendant or was subsequently ratified by it, and there being no evidence whatever tending to show that the defendant (plaintiff in error) either authorized or ratified the act of Bartow in writing and mailing the letter sued on, but on the contrary the evidence being distinct and uncontradicted, that the company's chief officers knew nothing of the writing of the letter until the institution of this suit, it was clearly erroneous to tell the jury that in ascertaining the damages they might allow the

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plaintiff, the standing of the defendant company might be considered."

We know of no other cases which have reached this court except these two, in which actions have been maintained against principals for insulting words uttered by their agents, and both of these cases were actions for common law libel as well as for insulting words under the statute.

Then, in *Boyd* v. *Boyd,* 116 Va. 326, 9 Va. App. 244, 82 S. E. 110, there was an action based on the statute. It appeared that a stepson had published grossly insulting words of his stepmother, but there was no evidence of actual damage, and the court was asked to set aside a substantial verdict upon the ground that in the absence of actual damage there can be no recovery of punitive damages under the Virginia statute. This court said: "It is unnecessary in this case to consider whether or not publication is necessary to maintain an action for insulting words, since if it be, it is clear that there was a publication in this case. Neither was it necessary for the plaintiff to prove actual pecuniary loss resulting from the utterance of the insulting words in order that the jury might give punitive damages. The law presumes that damages result from the utterance of insulting words, made actionable by our statute, just as it does where the words uttered are actionable *per se;* and it is not necessary in either case, in order to recover, to prove actual or pecuniary loss."

Applying the suggestions contained in these cases, we have here an action for insulting words where no actual damages are proved, and where, as a necessary consequence, the only damages which can be recovered are punitive damages, and this only because of the Virginia statute authorizing the recovery of such punitive damages for insulting words. As we have undertaken to show, however, this plaintiff cannot recover punitive damages of the Director General on account of insulting words uttered by its agent for two reasons—first, because the federal government has

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not consented that the Director General shall be penalized or subjected to punitive damages imposed by statute, and, second, because in this case there has been no ratification of the insulting words by the Director General. No actual damages have been proved, and hence the only possible recovery in this case is for exemplary or punitive damages. This being true, it is logical to hold that the plaintiff has failed in his proof to show that he is entitled to any damages against the Director General, however clear his right may appear to be, under the statute, to have submitted to a jury his right to penalize or recover punitive damages of Warthen, who uttered the insulting words.

Our conclusion, therefore, is, in accordance with Code, section 6365, to enter final judgment here in favor of the Director General.

Reversed.

DIRECTOR GENERAL OF RAILROADS (NORFOLK & WESTERN RAILROAD *v.* HARRELL'S ADM'R.

(*Wytheville, June 15, 1922.*)

1. **RAILROADS—Principal and Agent—Scope of Employment—Gateman—Shooting of Person Crossing Railroad Tracks—Liability of Company.**

Error to Circuit Court of city of Norfolk.

Affirmed.

Hughes, Little & Seawell and *F. M. Rivinus*, for the plaintiff in error.

Tazewell Taylor and *H. R. Leary*, for the defendant in error.

WEST, J.:

The defendant in error, E. S. Merrill, administrator of Claudia Harrell, deceased, recovered a judgment against

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John Barton Payne, director general of railroads, the immediate predecessor of the plaintiff in error, J. C. Davis, director general of railroads and agent under section 206 of the transportation act of 1920, in the Circuit Court of the city of Norfolk, for $10,000.00, with interest from November 18, 1920, and costs, for negligently and wrongfully causing the death of said Claudia Harrell. The case is here upon a writ of error to that judgment.

For convenience, the parties will be designated as plaintiff and defendant, with respect to their positions in the trial court.

About one o'clock A. M. on October 11, 1919, the plaintiff's intestate, in company with several others in an automobile, was returning from Ocean Park to her home in Norfolk. When they arrived at the Norfolk and Western Railroad crossing on Brambleton avenue, they were stopped by the closed gates, although no train was approaching. After being called several times, the gateman, Branch A. Ford, came out of a nearby storehouse with a lantern in his hand. The chauffeur asked him to please raise the gates, to which he replied: "There is other crossings you can go over besides this one." The chauffeur told him he didn't have time to go all over town looking for crossings, when there was no train standing there and no train approaching. Ford then left, going towards the tower and started up, mumbling something the driver could not understand.

As soon as he entered the tower box he raised the gates, and as the car was leaving the wood part of the crossing, Ford fired three pistol shots at the rear of the car, in quick succession, one of which struck Claudia Harrell in the back, giving her a wound from which she died shortly thereafter in a Norfolk hospital.

Ford was arrested a few hours later under a warrant charging him with murder. The officers who made the arrest and all other witnesses who saw him that night and

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next day, except J. T. Routten, testified that he talked and acted as a sane man, and that they saw nothing strange in his conduct. Routten thought he acted strange, and he appeared to him to be upset mentally.

On January 21, 1920, Ford was adjudged insane and committed to the Southwestern State Hospital for proper care and observation, with instructions to the superintendent to inform the Corporation Court of the city of Norfolk from time to time of his mental condition.

The defendant contends that the trial court erred:

1. In overruling the demurrer to the plaintiff's amended declaration.

2. In refusing to give a certain instruction asked for by the defendant.

3. In overruling defendant's motion to set aside the verdict of the jury and enter judgment for defendant.

The plaintiff rests the liability of the defendant on two grounds:

1. "That the killing of the plaintiff's intestate by the defendant's employee arose out of and was a part of a transaction between the plaintiff's intestate and the defendant company, in which the gateman, Ford, was acting for the defendant company, said transaction being within the scope of the gateman's employment. And—

2. "That the defendant company was responsible for the employment of a servant of the character of the gateman, when it not only knew by reason of its previous discharge of him, but might further have known by the exercise of ordinary care that he was an incompetent and dangerous person to entrust with duties of the character in question."

The first assignment of error will be considered along with the third assignment.

(a) The instruction referred to in the second assignment of error reads as follows:

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"If you believe from the evidence that Ford's duties as crossing watchman for the railroad did not require or authorize him to commit the act which resulted in Claudia Harrell's death, but that it was his personal act, outside of the scope of his duty, then you must find for the defendant."

The court gave the following instruction as the only instruction in the case:

"If you believe from the evidence that Ford did not act within the scope of his authority and the duty in committing the act which resulted in the death of Claudia Harrell, but outside of the scope *of* his authority, then you must find for the defendant."

The instruction refused was properly refused for the reason that it directs a verdict for the defendant on a partial view of the evidence. There is evidence tending to support the plaintiff's contention that the defendant was liable for its conduct in employing for gateman a person whom it knew, or by the exercise of ordinary care ought to have known, was an unfit person for the position. Yet, under the instruction in question, even though the jury might have believed the defendant negligent in this respect, they would have been compelled to return a verdict against the plaintiff, if they were of the opinion that Ford's act was not required, or authorized by the defendant. Besides, the instruction given, *supra,* sufficiently covered the law of the case.

There is no merit in this assignment.

(b) Was Ford acting within the scope of his employment when he fired the fatal shot?

If a person, acting for himself, willfully and maliciously inflicts an injury upon another, he is liable in damages for such injury. And there is no reason why a master should be permitted to turn his business over to servants who have no regard for the public welfare and thereby escape the responsibility which he would otherwise have to bear. It

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is manifestly right and just that both corporations and individuals be required to answer in damages for wanton and malicious assaults inflicted upon others by their servants, while acting within the scope of the servants' employment and duty, and it matters not whether the act of the servant is due to a lack of judgment, the infirmity of temper, or the influence of passion or that the servant goes beyond his strict line of duty and authority in inflicting such injury; and the authorities so hold.

In *Railroad Co.* v. *Quigley*, 21 How. 202, it is held that, "for acts done by the agents of a corporation, either in *ex contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances."

In the case of *Richberger* v. *Am. Exp. Co.*, 73 Miss. 161 (in which the plaintiff went to the office of the defendant to pay an overcharge on express matter and subsequently returned to have the overcharge refunded, and immediately upon signing and delivering the receipt therefor, the defendant's servant cursed and insulted the plaintiff), the court says:

"It is impossible to say, on the allegations of this declaration, that the tort committed immediately upon the delivery of the receipt to the agent, and because of the demand for the refunding of what was plaintiff's conceded due, was so separated in time or logical sequence as not to have been an act done in the master's business. The whole transaction occurred in the shortest time, and was one continuous and unbroken occurrence. The cursing and abusing and maltreatment were all administered in connection with the taking of the receipt and immediately upon its delivery, and because of the demand for his rights in that matter, and while plaintiff was in appellee's office to transact, and transacting, this very business. What was said and done thus immediately upon the delivery of the receipt was part of the *res gestae*. * * * The master who puts

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the servant in a place of trust or responsibility or commits to him the management of his business or care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty and authority and inflicts an unjustifiable injury upon another."

In *New Ellerslie Fishing Club* v. *Stewart* (Ky.), 9 L. R. A. (N. S.), 477, the following language is used:

"It is difficult to define with accuracy the point at which the master's liability for the acts of his servant ends, but, under the facts of this case, Proctor, when he attempted to prevent appellee from fishing, and when the altercation between them commenced, was clearly acting within the scope of his employment, and the assault and battery complained of was merely a continuation of the first act. There was no appreciable length of time between them. Everything that was done happened on the premises under the control of the fishing club, and where Proctor had authority as its agent. Where the agent begins a quarrel while acting within the scope of his agency, and immediately follows it up by a violent assault, the master will be liable, as the law under the circumstances will not undertake to say when, in the course of the assault, he ceased to act as agent and acted upon his own responsibility."

In *Wise* v. *C. & O. R. Co.*, 91 Ky. 537, the company was held liable for an assault by its conductor on a passenger committed on the street and after the passenger had left the car, the court holding that the altercation having commenced on the car, the assault was merely a continuance of the wrong.

To the same effect is *Fick* v. *Chicago Ry. Co.*, 68 Wis. 469; *Maniaci* v. *Interurban Express Co.* (Mo.), 182 S. W. 981, and *Hael* v. *Wabash Ry. Co.*, 119 Mo. 325.

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In the *Maniaci Case* the controversy between the plaintiff and defendant's servant arose over the signing of a receipt by the plaintiff, and resulted in the defendant's servant, without just cause, shooting the plaintiff. It was held that the act came within the scope of the servant's employment and the defendant company was held liable for the injury done to the plaintiff.

In the *Hael Case,* a watchman in charge of a railroad bridge shot and killed the plaintiff's intestate, who had no lawful right on the bridge, while he was retreating, and the appellate court sustained a judgment of the trial court in favor of the plaintiff.

In *Savannah Electric Co.* v. *Wheeler* (Ga.), 10 L. R. A. (N. S.) 476, a drunken conductor had a dispute with a passenger on the street car, and, firing a pistol at the passenger, missed him, but struck and killed a passerby on the public street, and the company was held liable for the death of the deceased.

In the instant case, the contention arose over the raising of the gates at a late hour of the night (a matter admittedly within the scope of the gateman's employment and duty), and as an immediate result thereof, the gateman shot and killed the deceased. The two acts constitute parts of one and the same transaction.

In 2 Mechem on Agency (2nd ed.), section 1960, the author defines "scope of employment" as follows:

"In many cases, no better definition can be given than the words themselves suggest. But, in general terms, it may be said that an act is within the course of the employment if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill advisedly, with a view to further the master's interests, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from

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some external, independent, and personal motive on the part of the servant to do the act upon his own account."

Judge Sims, speaking for the court, in *Myers* v. *Lewis*, 121 Va. p. 71, 14 Va. App. 202, after reviewing the authorities on the subject, says the test of the liability of the master for the tortious act of the servant, is not whether the tortious act itself is a transaction within he ordinary course of the business of the master or within the scope of the servant's authority, but whether the service itself. in which the tortious act was done, was within the ordinary course of such business or within the scope of such authority.

When the foregoing authorities are applied to the facts in the instant case, it is manifest that the defendant is liable for the act of its agent in inflicting the injuries complained of.

The parties in the automobile had no communication with the gateman, personally, but only as the servant of the defendant.

The gates were closed when plaintiff's intestate arrived. It was the duty of Ford to open and close them. Incensed by the request that he raise the gates at that hour of the night, as he climbed into the tower he became angry, and, immediately upon raising the gates, began firing at the parties before their automobile had cleared the right of way of the defendant. Ford was charged primarily with the duty of protecting the traveling public from the passing trains of the defendant, but this duty carried with it the obligation not to injure them himself.

(c) Was the defendant responsible for the employment of an incompetent and dangerous person for gateman when it employed Ford, and did it know, or could it, by the exercise of ordinary care, have known, that he was an incompetent and dangerous person to be entrusted with such duties?

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The plaintiff rests his contention that Ford was a dangerous and improper person to be employed for the position of gateman, on three reasons:

1. Because he was discharged from the operating department of the Norfolk and Western many years ago for drunkenness, and for a number of years, immediately preceding the adoption of State-wide prohibition in Virginia, was widely known in police circles in Norfolk as a common drunkard.

2. Because of a form of insanity, superinduced by persistent drunkenness.

3. Because he was easily incensed and would get into a tantrum or become dangerously angry on slight provocation.

We think it has been sufficiently shown, *supra,* that, whether Ford's homicidal act was due to drunkenness, ungovernable temper, or malice, he was at the time of its commission engaged in a service which was within the scope of his employment.

There is no evidence tending to show that Ford was drunk on the fatal night, nor that his mental condition was abnormal, except the testimony of Witness J. T. Routten, who saw him the next day. Lambert, who was driving the automobile, testified that prior to the shooting there was nothing to make him think Ford was crazy, and later in the night when he saw him in the police station there was nothing to indicate insanity, as "he was just like any ordinary-looking man." Boggs, the police officer who arrested Ford the night of the homicide, found him at his post of duty in the tower and testified that Ford talked sanely and looked like a sane man to him.

The allegations contained in the plaintiff's reason No. 1, *supra,* touching drunkenness, are admitted to be true. And there is ample evidence tending to prove that Ford was a man who would become highly incensed over a very simple matter and get dangerously angry from slight provocation.

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Witness Routten, who has known him for several years, testified that on one occasion witness was putting up a desk and simply asked Ford to put a screw in it, and he got very mad and grabbed his hat and went out like he was mad enough to kill Routten. Routten says he would have "spells."

The record shows that Ford was employed by W. R. Crawley, who had charge of all the defendant's watchmen around Norfolk, upon the recommendation of S. A. Coleman, who held a position as watchman with the Norfolk and Western, and made no inquiry of any one else concerning Ford's past record, habits or general fitness for the position. Had he looked up his record with the Norfolk and Western, showing his discharge for drunkenness, and made some inquiry of the members of the police force at Norfolk, he would probably not have given him the position.

In *Williams* v. *Mo. Pacific Ry. Co.*, 109 Mo. 475, 18 S. W. 1098, the court said:

"The real question here is whether there is evidence to support the finding of the jury. According to the plaintiff's witnesses, Clark was an habitual drinker, often drunk when off, and sometimes when on, duty, and was seldom free from the influence of liquor. From these facts, the jury had a right to draw the inference that Clark was an unfit person to be intrusted with the responsible duties of a locomotive engineer, even in his sober intervals. The evidence shows that it requires a man of steady nerve, cautious and not forgetful, to discharge such duties. That these elements of physical and mental strength will and do yield and give way from continued intemperate habits is but common information. Besides this, all of the defendant's witnesses who testify upon the subject say that a man having the habits which the plaintiff's witnesses say Clark had, should not be put in charge of a locomotive engine. It requires no temperance lecture to satisfy the mind of any one that there

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is an abundance of evidence to uphold and support the verdict on this issue."

In *Christian* v. *Columbus R. Co.* (Ga.), 7 S. E. 216, we find this:

"But this declaration alleges that the railroad company employed him knowing his infirmity; and that, of course, subjects the company to the consequences, if it be true. Their employment of an improper person to come in contact with the public as their agent would be gross misconduct."

It follows that the first and third assignments of error are, likewise, without merit.

For the foregoing reasons, we are of the opinion that there is ample evidence to support the verdict of the jury, and that the judgment complained of is plainly right and should be affirmed.

Affirmed.

FORTUNE *v.* COMMONWEALTH.

(*Wytheville, June 15, 1922.*)

1. CRIMINAL LAW.—Evidence—Depositions Before Coroner—Credibility of Witnesses—Impeachment.
2. IDEM.—Evidence—Collateral Matter—Party Bound by Answer of Witness on Cross-Examination.
3. IDEM.—Instructions—Attack Within Own Curtilage—Resistance—Defense of Castle—Waiver.
4. IDEM.—Instructions—Abstract Proposition—Right to Kill.
5. IDEM.—Instructions—Justification of Killing.
6. IDEM.—Instructions—Refusal When Sufficiently Instructed.
7. IDEM.—Evidence—Contradictory Statements—Impeachment.
8. IDEM.—Instructions—Justifiable Killing—Jury—Voluntary Manslaughter.

Error to Corporation Court of city of Lynchburg.

Reversed.

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Aubrey E. Strode, for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

There were two trials of this case, the first resulting in a hung jury, the second in a verdict finding the accused, Heywood Fortune, guilty of murder in the second degree and fixing his punishment at eight years in the penitentiary. The judgment under review was entered accordingly.

Prior to the homicide the deceased, John Bays, had gotten eggs from the accused for setting purposes from time to time, they had also had dealings about chickens and the relations between them were friendly. The homicide occurred on April 27th, between half past seven and eight o'clock P. M. The deceased accompanied by one Will Hamlett, a brother-in-law, went to the home of the accused for the purpose of getting more eggs from the latter. On their arrival they called to the accused to come out. The latter who was at supper at the time, called back that he would come out in a few minutes, and the deceased and his companion passed along the side of the house, and went into the yard back of the residence of the accused and awaited the coming of the latter out of the house. In a short time the accused finished his supper and came out into the back yard, where the deceased and Will Hamlett were standing near the chicken house of the accused. The accused and the deceased greeted each other pleasantly, but upon the want of the deceased to obtain more eggs being made known to the accused he refused to let the deceased have any more eggs, stating that the latter already owed him. The deceased denied owing the accused anything. Thereupon there was an angry and mutually insulting interchange of words between them, followed by the accused drawing a pistol and firing three shots at the deceased, two of which took effect, one penetrating the head, entering in the forehead,

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just above the left eye, and the other the body of the deceased entering his left breast. Both were mortal wounds and the deceased expired in a few minutes. There was an appreciable interval between the first shot and the two shots following.

There were only three eye-witnesses of the occurrence, besides the deceased, namely, Will Hamlett, the accused and his housekeeper, Sallie Cail. The last named did not, however, see the actual shooting, but testified as to what occurred immediately preceding the firing of the first shot. Will Hamlett testified as a witness for the Commonwealth, Sallie Cail for the accused, and the latter took the stand as a witness in his own behalf. There was a sharp conflict between the testimony for the Commonwealth and that for the accused on the subject of the provocation for the shooting.

The testimony of Will Hamlett was to the effect that the accused began the angry controversy by calling the deceased a damn liar, that the deceased merely "told him he was another;" that when the accused added still more insulting epithets, the deceased merely replied to each that "he was another;" that then the shooting started; that the accused did not tell the deceased to get off the premises; that witness saw the first shot, following which the deceased fell; that witness then turned his head and did not see the two other shots; that the deceased did not throw a rock at the accused, but had both hands in his pockets when the first shot was fired and made no motion to advance on the accused; and that no rock was thrown by the deceased.

The testimony of the housekeeper and the accused is somewhat confused and conflicting as to precisely what occurred; but their testimony, taken together, is to the effect that the deceased was the aggressor in the use of insulting language; that the accused in the midst of the angry altercation ordered the deceased off the premises; that this order was unheeded, and that the deceased thereupon ad-

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vanced upon the accused in a threatening manner, threw a rock at the accused, just before, or was about to throw it as the first shot was fired, and was getting up as the accused supposed with, or was about to get, another rock, with the purpose of throwing it at the accused, when the last two shots were fired.

Will Hamlett, in his testimony on the trial admitted that a few hours after the shooting he stated, in the presence of the accused and several other persons, that the deceased threw a rock at the accused, but claimed that he made this statement because the accused forced him to do so. That what forced him to do this was that the accused had told him that "it wou'dn't be good" for him if he did not make this statement, and that the accused still had the pistol in his hand when witness made the statement. And he denied that he had made this statement at any other time. Several witnesses for the accused contradicted the denial of Will Hamlett just mentioned.

The widow of the deceased, also a witness for the Commonwealth, testified on the trial that Will Hamlett came to her house the night of the shooting and told her that the accused had forced him to say that the deceased "was throwing rocks." The testimony of Will Hamlett on the trial was to the same effect on this point.

There was a coroner's inquest, the next day after the homicide, at which Wlll Hamlett and the widow of the deceased testified. The coroner, after having testified as a witness for the Commonwealth, was called as a witness for the accused on the subject of what testimony was given by Will Hamlett and the widow before him at the inquest. He testified that these witnesses did testfy before him at the inquest. That their depositions were written out by an amanuensis present at the time and were then and there read over to the witnesses who authorized him (the coroner) to sign their names to the depositions as their depositions, which he (the coroner) then and there did, they

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touching the pen. As set forth in this deposition of the widow, it appears that she testified before the coroner that —"Will (Hamlett) told us that John (the deceased) throwed a rock at Mr. Fortune first and then Mr. Fortune shot him," making no mention of Will Hamlett having said that he made this statement because forced to do so by the accused; and as set forth in the deposition of Will Hamlett before the coroner, he was asked. "Did John (the deceased) make any effort to hit Mr. Fortune?;" he answered: "If he did I didn't see him, I was looking over in the chicken pen." It does not appear in this deposition that he was asked or made any statement about the rock-throwing or about his having been forced by the accused to make any statement about it. The accused by counsel, after laying the foundation therefor as required by statute, (sec. 6216 Code, 1919), asked leave of the trial court to introduce the depositions aforesaid in evidence for the purpose of contradicting the testimony aforesaid of Will Hamlett and of the said widow on the subject of the rock-throwing. The court, upon the objection of the attorney for the Commonwealth to their accuracy, refused to admit the depositions in evidence, but ruled that the accused might prove by the coroner what the witnesses testified to before him, if the coroner could testify thereto from his recollection without the aid of reference to the depositions. The coroner, however, testified that he could not remember the testimony without reference to the transcript of the testimony contained in the depositions. Whereupon the court ruled that the coroner could refer to the depositions and state whether or not Will Hamlett and the said widow made before him at the inquest any statement with respect to the rock-throwing contradictory to their testimony on the trial of the case; that this was all the coroner could testify to. Whereupon no further questions were asked the coroner by counsel for the accused and the coroner left the witness stand.

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Thereupon Will Hamlett was recalled to the witness stand and in answer to a question on cross examination denied that the coroner "had gone over his testimony at the coroner's inquest and asked him if it was correct," and the court held that this was collateral matter upon which the answer of the witness to the question was conclusive upon the accused, so that the truth of the answer could not be inquired into, and the court thereupon excluded all of the testimony of the coroner on the subject of the depositions aforesaid.

The court refused to give the following instructions asked for by the accused:

Defendant's Instructions Refused.

"4. A man upon his own premises when attacked is under no duty to retreat but may resist the aggressor and in so doing may use such force as appears to him as a prudent man reasonably necessary to repel the attack and to subdue the aggressor or compel him to leave the premises.

"5. A man when assaulted is held accountable under the law only for the exercise of such judgment as is warranted by the circumstances as they reasonably appear to him at the time.

"6. If one who is free from fault in bringing on the difficulty is attacked by another upon his own premises in such a manner as would raise in a reasonable mind the belief that he is in imminent danger of great bodily harm, and he is so impressed he is not under any obligation to retreat but may take the life of his assailant and be justified under the law.

"7. If the jury believe from the evidence in this case that the defendant was assaulted by the deceased with such violence as to make it appear to the defendant at the time that the deceased manifestly intended and endeavored to take his life or do him some great bodily harm and that

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the danger was imminent and impending then in that case the defendant was not bound to retreat but had the right to stand his ground, repel force with force and, if need be, kill his adversary to save his own life or prevent his receiving great bodily injury, and it is not necessary that it shall appear to the jury to have been necessary.

"8. If the jury from the evidence have a reasonable doubt as to whether the defendant had reason to believe as a reasonable man, that he was in danger of being killed or seriously injured by the deceased at the time he shot the deceased then the jury should find the accused not guilty.

"9. The court instructs the jury that it is not essential to the right of self defense that the danger should in fact exist.

"If to the defendant it reasonably appeared that the danger in fact existed he had the right to defend against it to the same extent and under the same rules which would obtain in case the danger had been real.

"The defendant may always act upon reasonable appearance of danger, and whether the danger is apparent or not is always to be determined from the standpoint from which the defendant viewed it at the time he acted.

"10. If the jury believe from the evidence that on the evening, the date alleged in the indictment, the deceased came with a companion upon the premises of the accused and into the backyard of his residence, that while there a quarrel arose between the deceased and the accused, that the deceased was ordered by the accused to leave the premises, that the deceased did not do so but instead, without being himself assaulted, seized and threw a rock at the accused and then advanced upon him with threats and gestures reasonably giving the accused cause to believe that he was in danger of death or serious bodily harm, that the accused did so reasonably believe and in what he believed the necessary defense of himself shot the deceased they should find the accused not guilty."

The court thereupon gave the following instructions:

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Instructions Given.

"The court instructs the jury that the issue which they are trying is whether the killing of John Bays by Heywood Fortune was justfiable or not.

"The following instructions set forth the law applicable to the case:

"No. 1.—Any willful, deliberate or premeditated killing of a human being is murder of the first degree. All other murder is murder of the second degree.

"Voluntary manslaughter is unlawful homicide done in heat of sudden passion caused by adequate provocation and not from malice.

"No. 2.—The prisoner enters upon his trial presumed to be innocent, and the burden of proof is upon the Commonwealth to establish his guilt by evidence beyond a reasonable doubt, but if it is proven that the prisoner killed John Bays, the law presumes that the prisoner is guilty of murder in the second degree, and in order to elevate the offense to murder in the first degree, the burden is on the Commonwealth, but, on the other hand, the burden is on the prisoner to show by evidence the absence of malice, or that the killing was done in self-defense.

"No. 3.—The court instructs the jury that if they believe from the evidence that the prisoner gave the deceased a mortal wound with a pistol in his previous possession, without any or upon slight provocation, then the killing of the deceased was *prima facie* murder in the first degree, throwing on the prisoner the necessity of proving extenuating circumstances.

"No. 4.—If, upon the whole evidence or any part thereof necessary to establish the guilt of the prisoner, or the degree

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of his crime, the jury have a reasonable doubt, they should give him the benefit of the doubt.

"No. 5.—That to constitute willful, deliberate or premeditated murder it is not necessary that the deliberation or premeditation should exist for any particular length of time—it is only necessary that such intention should come into existence for the first time at the time of the killing, or at any time previous to the killing.

"No. 6.—That words, however grievous, will not justify an assault.

"No. 7.—That if they believe from the evidence that a quarrel arose between the prisoner and the deceased, that prisoner was without fault in provoking the assault, that the accused ordered the deceased to leave his premises, which he did not do; that the deceased, without being himself assaulted, seized and threw a rock at the accused, and then advanced upon him with such violent threats and gestures that a reasonable man similarly situated would have believed that he was in imminent danger of death or serious bodily injury, and that it was then and there necessary to kill the deceased to protect himself from death or serious bodily injury from said assault, then such killing was justifiable and they should find the prisoner not guilty.

"No. 8.—That the law of self-defense is the law of necessity, and if they believe from the evidence that after the deceased had thrown the rock which did not strike the accused, and was advancing towards him, the deceased had no other weapon, and that a reasonable man similarly situated and armed as was the accused, would have used other less violent means to protect himself from said assault or that the danger of death or serious bodily injury from said assault was not so imminent that the killing of the deceased

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was then and there necessary for his protection, then said homicide was not justifiable and they should find the prisoner guilty.

"No. 9.—The court instructs the jury that the proof that a witness made contradictory statements is for the purpose alone of impeachment of the veracity of the witness, and does not give such statement the effect of evidence. Therefore, the statements of the witnesses, the Gunters and the Harrises, as to what was told them by Sallie Cail would not be evidence against the prisoner, nor would the statements made by the witnesses to impeach Caddie Bays or Will Hamlett be evidence for the prisoner."

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

There is one assignment of error touching a remark of the learned trial judge before the jury during the trial, which we need not deal with, as the case must be reversed on other grounds and no occasion for such a remark is likely to arise on a new trial.

The questions presented by the remaining assignments of error will be disposed of in their order as stated below.

1 }

1. Did the court, upon the mere objection of the attorney for the Commonwealth to their accuracy, err in refusing to admit in evidence the depositions of Will Hamlett and of the widow of the deceased before the coroner at the inquest, as reduced to writing by an amanuensis present at the time, then and there read over to the witnesses, who authorized the coroner, according to his testimony, to sign their names thereto as their depositions and who then and there accordingly signed such names to the depositions?

This question must be answered in the affirmative.

Two positions are taken by the Attorney General on this subject:

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First: It is urged that the court committed no error in refusing to admit the depositions in evidence upon the attorney for the Commonwealth making objection to their accuracy.

Such mere objection was not sufficient to establish the fact that the depositions were inaccurate. Indeed, absolute accuracy was not essential to their admission in evidence. How accurate or inaccurate they were was a question which was open for testimony pro and con and went merely to the weight to be given them by the jury and not to their admissibility in evidence.

The testimony of the coroner on the subject was sufficient to authenticate the depositions so as to make them at least *prima facie* evidence of the testimony of these witnesses as given at the inquest. And the accused was entitled to have the jury consider whether such depositions, subject to such impeachment of their accuracy as the Commonwealth could produce, affected the credibility of the testimony of these witnesses, or either of them, on the trial, and, if so, to what extent. *Wormley's Case,* 10 Gratt. (51 Va.) 658, 688-9; *N. Y., P. & N. R. R. Co.* v. *Kellum,* 83 Va. 851, 860.

Secondly: It is urged that, as several witnesses were introduced for the accused who contradicted Will Hamlett in his testimony on the trial, to the effect that he had never made the statement as to the rock-throwing at any other time than upon the occasion a few hours after the homicide, when he claimed the accused forced him to do so, the accused had successfully impeached the witness Hamlett on this subject without the aid of the depositions aforesaid, and, hence, the accused was not hurt by the refusal of the court to admit the depositions in evidence, so that if that action of the court was error, it was harmless error.

This position, however, does not at all reach the consideration that the accused had the right to introduce the depositions as bearing upon the credibility of the widow. And,

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as bearing upon the credibility of Will Hamlett, the depositions under oath constituted a different character of evidence from the other impeaching testimony aforesaid, and, hence, was not merely cumulative, so that it cannot be said to have been harmless error to refuse to admit this evidence, even as to Will Hamlett's credibility on the subject of the rock-throwing.

2 }

2. Did the court err in ruling that the testimony of Will Hamlett, in answer to a question by counsel for the accused on cross-examination, denying that the coroner had verified the deposition of the witness given at the inquest by going over it with the witness at the time and asking him if it was correct, was collateral matter upon which the answer of the witness was conclusive upon the accused, so that the truth of such testimony could not be inquired into, as a result of which ruling the court excluded the testimony of the coroner to the contrary?

The question must be answered in the affirmative.

The rule is undoubtedly well settled that a party is bound by the answer of a witness to a question on cross-examination upon a collateral matter. But whether the deposition in question had been verified by the coroner was not a collateral matter in this case. The question of the verification was directly in issue because it involved the weight and effect to be given the deposition as bearing upon the inquiry of whether the testimony of Will Hamlett before the coroner affected the credibility of the testimony of such witness, and also that of the widow, given upon the trial of the case. Therefore, the testimony of the coroner in question was material to this issue and should not have been excluded, but should have gone to the jury along with the depositions and the testimony of Will Hamlett on the subject, for their consideration and for their determination of whether certain portions of the testimony of Will Hamlett and of the widow on the trial were true.

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As said of one cross-examining a witness, in *Welch* v. *Insurance Co.*, 23 W. Va. 288, 303: "It is true, if he examined him as to a collateral fact, he must take the answer and cannot contradict it. *Spencely* v. *De Willet*, 7 East, 108; *Rex* v. *Watson*, 2 Stark. B, 116. But this rule does not extend to cross-examination upon facts material to the issue. And he may inquire into other material facts to the issue than those elicited by the party calling the witness, and, if the answers are not satisfactory, he may, by any legal proof, contradict or discredit them. 1 Stark. Ev. 164 (Metc. I. & G. Ed. 1876)."

3

3. Did the court err in refusing to give instruction 4, asked for by the accused?

The question must be answered in the negative.

This instruction, as applicable to an attack upon one within his own curtilage (and the accused was within his own curtilage in the instant case), would have been correct if it had stopped with the word "attack." But the additional language, "and to subdue the aggressor or to compel him to leave the premises," rendered the instruction incorrect.

One, in his own curtilage, who is free from fault in bringing on the combat, when attacked by another, has the same right of conduct, without any retreat (*i. e.*, to stand at bay and resist assault), even to the taking of life, that one has when within his own home. See note to 5 Am. & Eng. Anno. Cas., p. 999, and cases cited, among them *Beard* v. *U. S.*, 158 U. S. 550, 15 Sup. Ct. Rep. 962, approved in *Alberty* v. *U. S.*, 162 U. S. 499, 16 Sup. Ct. Rep. 864. What force one, on his own premises, may use to eject another therefrom, short of endangering human life or of doing great bodily harm, was the subject of consideration in *Montgomery's Case*, 98 Va. 840, 842-3, 99 Va. 833, 835-6. But in no case, even within one's own home, or curtilage is a person wholly justified in taking the life of another who has entered the home or curtilage peaceably on an im-

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plied license, merely to punish or subdue him or to compel him to leave the premises, where there is no apparent intent on the part of the latter to commit any felony.

As said in 1 Bish. New Cr. Law (8th Ed.), sections 857, 858: "* * * the general rule is that while a man may use all reasonable and necessary force to defend his real and personal estate, of which he is in the actual possession, against another who comes to dispossess him without right, he cannot innocently carry this defense to the extent of killing the aggressor. If no other way is open to him, he must yield, and get himself righted by resort to the law. A seeming exception to this rule is the—

"*Defense of the Castle.* In the early times, our forefathers were compelled to protect themselves in their habitations by converting them into holds of defense; and so the dwelling house was called the castle. To this condition of things the law has conformed, resulting in the familiar doctrine that while a man keeps the doors of his house closed, no other may break and enter it, except in particular circumstances, to make an arrest or the like—cases not within the line of our present exposition. From this doctrine is derived another, namely, that the persons within the house may exercise all needful force to keep aggressors out, even to the taking of life. As observed by Campbell, J., in Michigan, 'a man is not obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house or prevent his forcible entry, even to the taking of life.' * * *."

But the same learned work continues, in section 858, as follows:

"1. *Waiving Castle.*—One may waive the protection of his castle by permitting another to enter; * * *."

"2. *Putting out of the Castle.*—If a man enters another's dwelling house peaceably on an implied license, he cannot be ejected except on request to leave, followed by no more than the necessary and proper force, even though misbe-

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having himself therein. * * * Hence, a needless battery, resulting in death, employed in ejecting an intruder from the dwelling house, will constitute felonious homicide."

There is no evidence in the case in judgment tending to show that the deceased entered the premises of the accused by force. He was there, and was greeted in a manner which indicated that he was there by permission of the accused before the affray began. His subsequent conduct, granting that it was misconduct, did not justify the killing of him unless that conduct was such as to justify it on the part of the accused under the settled doctrine applicable to the killing of an assailant by one in defense of his own person.

Therefore, none of the instructions in the case should have been predicated upon the existence or nonexistence of the circumstance of the ordering of the deceased off the premises, since that is an immaterial circumstance so far as the instant case is concerned and could serve no purpose but to mislead the jury, unless they were more fully instructed on that subject than they were.

Parrish's Case, 81 Va. 1, is cited and relied on for the Commonwealth. In that case the court was divided, there being a bare majority of one for the majority opinion. The holding of that opinion on the subject of the relation of Parrish to the deceased cropper is in conflict with *Lowe* v. *Miller*, 3 Gratt. (44 Va.) 205, not cited in the opinion, and is otherwise, as we think, unsound in its holding with respect to the principles of law applicable to the facts of that case, so that the court, as now constituted, feels constrained to disapprove of such holding. However, of that case this should be said: The decision was placed both on the ground that the killing was done in order to prevent the forcible entry of the assailant into a building within the curtilage, by breaking and entering, and that, too, in the night-time (which was held to have been a felony committed in the

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presence of the accused), and on the ground that the killing was in self-defense.

4 }

4. Did the court err in refusing to give instructions 6 and 10, asked for by the accused?

This question must be answered in the negative.

Instruction 6 is correct as an abstract proposition of law, but it is so general in its terms that it is open to misconception. It is not sufficiently specific in pointing out that the right to kill under the circumstances mentioned begins and ends with the apparent necessity therefor in order to protect the accused from death or great bodily harm. The same principle is covered by and is better expressed in instruction 7, asked for on behalf of the accused.

Instruction 10 contains the reference to the immaterial circumstance of the ordering of the deceased off the premises, which, as aforesaid, could serve no useful purpose except to mislead the jury, unless they were more fully instructed on that subject. With the omission of such reference, this instruction was a proper instruction.

5 }

5. Did the court err in refusing to give instructions 5 and 7, asked for by the accused?

This question must be answered in the affirmative.

These instructions correctly stated the law as applicable to the evidence; were proper instructions and should have been given; unless covered by the provisions of the instructions which were given. This does not appear to be the case. Instruction 7, given by the court, is the only instruction which makes any approach to covering the rule of law embodied in the instructions 5 and 7 now under consideration. As we shall see, however, when we come to specifically consider instructions 7 and 8 given by the court, instruction 7, as given, erroneously bases the justification for the action of the accused solely upon the abstract proposition of what a reasonable man similarly situated would have

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believed, omitting all provision with respect to what the accused actually believed and with respect to what was his actual motive in killing the deceased. But for instruction 8, this may have been harmless error, and the refusal of the instructions in question asked for by the accused might have been harmless error, if instruction 7, as given, had not been accompanied by instruction 8, for instruction 7 as given, was more favorable to the accused than he was entitled to have the jury instructed. Under that instruction, standing alone, he might have been acquitted, although the jury may have believed from the evidence that he did not in fact believe that he was in imminent danger of death or serious bodily harm, and did not in fact shoot the deceased in order to avert that danger. But when we read instruction 8, given by the court, we see that it is so linked with instruction 7, as given, in its reference to the action of the hypothetical reasonable man mentioned, under the actual, not the reasonably apparent circumstances, as to be plainly calculated to mislead the jury, in that it diverted their minds from the consideration of what was the actual motive of the accused as deduced from his situation and the circumstances as they reasonably appeared to him at the time, and left the jury wholly uninstructed upon that important feature of the case, which would have been correctly covered by instructions 5, 7 and 9, as asked for by the accused. Hence, instruction 7, as given, cannot be said to have properly supplied the place of the instructions 5 and 7 in question.

6

6. Did the court err in refusing to give instruction 8, asked for by the accused?

This question must be answered in the negative.

This instruction embodies the same legal principles as that which is embraced in instruction No. 4, which was given by the court. *Litton's Case,* 101 Va. 833; *Potts' Case* 113 Va. 732. The phraseology of the latter instruction was however, as we think, preferable in that it more clearly

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expressed the legal principle involved. The court was therefore, plainly right in using instruction No. 4 in announcing such principle to the jury, in preference to giving the refused instruction in question. And, since instruction No. 4 was given, it was of course unnecessary for any other instruction to have been given on the same subject.

7 }

7. Did the court err in refusing to give instruction 9, asked for by the accused?

This question must be answered in the affirmative.

This instruction correctly states the law as applicable to such a case as that in judgment. See the citations from Bishop above; also *Stoneman's Case,* 25 Gratt. (66 Va.) 887; *Brown's Case,* 86 Va. 466; *Field's Case,* 89 Va. 690; *Byrd's Case, Idem.* 536.

8 }

8. Did the court err in giving to the jury the initial instruction, which is unnumbered, to the effect "that the issue which they are trying is whether the killing of John Bays by Heywood Fortune was justifiable or not?"

This question must be answered in the affirmative.

This instruction uses the word "justifiable" without qualification. That carries the meaning of entirely or wholly justifiable. The instruction, therefore, withdrew from the jury all consideration of the subject of whether the killing, although not wholly justifiable, amounted only to voluntary manslaughter. It is true that instruction 1, given, defines voluntary manslaughter, but the initial instruction, in effect, tells the jury that this is not a subject which they can consider; so that, at the least, there was a conflict in the instructions which was likely to have misled the jury.

9. Did the court err in giving instructions 7 and 8?

This question must be answered in the affirmative.

Instruction 8 made the justification of the killing depend entirely upon the actual necessity therefor to prevent death

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or great bodily harm to the accused. This set up a wrong standard for the jury on this subject. Moreover, it wholly ignored the settled doctrine, above referred to, that a necessity reasonably regarded as real by the actor, who vouches it as inducing his action, is regarded as in fact real, so far as the charge of criminal conduct on the part of the actor is concerned. As noted above, instruction 7, as given, did not cure this defect. And there was no instruction given the jury which embodied this doctrine, so important to be considered by the jury, from the standpoint of the accused in determining his guilt or innocence. This left the jury wholly uninstructed upon a theory of the defense applicable to the evidence for the accused, embodying which proper instructions, to-wit, instructions 5, 7 and 9, were asked for by the accused and refused.

In view of the character of the errors aforesaid, as affecting the right of the accused to present his side of the case fairly and fully before the jury, it plainly appears that the errors were prejudicial to the accused's right of defense; hence, the case will be reversed and a new trial granted.

Reversed, and new trial granted.

FICKLEN *v.* FREDERICKSBURG POWER CO., INC., ET ALS.

(*Wytheville, June 15, 1922.*)

1. CONTRACTS.—Water Rights—Quantity of Water Contracted For—Evidence—Separation of Water Power from Land—Partition—Purchaser of Land and Water—Restriction in Use of Water.

Appeal from Circuit Court of Spotsylvania county.

Reversed.

Jno. B. Minor and *W. D. Carter,* for the appellant.
Alvin T. Embrey, for the appellees.

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BURKS, J.:

This litigation was initiated by a bill filed by Henry Warden in 1913 against the Fredericksburg Power Co., Inc. and others, for the partition of the Knox Mill property of which the complainant owned nine-tenths and the said Power Co. one-tenth. In another suit brought by the same complainant in 1918 against the Spotsylvania Power Co. Inc. as the successor in interest of the Fredericksburg Power Co. the claims of the complainant and of the Spotsylvania Power Co. are set forth at large and more in detail than in the first bill, and the same relief is prayed and in addition an accounting is asked, and an injunction prayed to compel the delivery to the complainant of the amount of water to which he was entitled. The real parties in interest in the two suits are the same. The reason for the institution of the second suit is set forth in the bill in that case as follows: "The said partition suit has been referred to special commissioner B. P. Willis for the usual enquiries and he is required specifically to report the amount of water to which the Knox Mill site is entitled under contract with the Spotsylvania Power Co. A great mass of testimony has been taken in that suit upon this specific question. The defendant has rested and very little additional testimony remains to be taken before said cause will be ready for submission to the commissioner. The same question will be the principal cause of controversy in this suit, but your orator is advised that the relief sought herein might not be obtained in said partition suit, wherefore, in order to avoid needless expense and delay in taking again in this suit the evidence taken in the said partition suit, as the parties and chief questions at issue are identical and the relief sought herein is incident and corollary of that sought in the said partition suit, your complainant is advised that it will be proper for the two cases to be hereafter heard together, and that the evidence

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heretofore taken in said partition suit shall be read in this suit."

Both bills were answered by the real defendants in interest therein, denying the claims of the complainant and setting up their grounds of defense in detail. The first bill, amongst other things, prayed "that the said real estate, together with all water and other rights, easements and privileges and the benefits thereto appurtenant be partitioned between the parties entitled thereto, or in the event that such partition be impracticable, that it be sold and the proceeds divided amongst those entitled thereto, according to their respective rights." In this prayer the Fredericksburg Power Co., Inc. united. The bill in the second suit, though not specifically praying for partition, prays that the two suits may be consolidated, not simply heard together, and that all the evidence taken in the first cause may be read and considered in the consolidated cause. Afterwards, it appearing that Ellen C. L. Ficklen had acquired all the rights and interests of Warden in the subject of litigation, the two suits were consolidated and heard as one suit, and Ellen C. L. Ficklen, the appellant, was substituted as sole complainant therein. The orders for accounts referred to were reported by the master, exceptions thereto were filed by the complainant which, so far as they affect the main question at issue between the parties, were overruled by the trial court, and from the decree overruling said exceptions the appeal in this cause was taken.

In 1803 Francis Thornton and Robert Dunbar were the joint owners of a mill pond on the Rappahannock river above Fredericksburg and had control of certain water power and eligible mill sites on that side of the river. By deed dated March 3, 1803, they conveyed to the Hollingsworth Bros. one and one-half (1½) acres of land for a mill site, with the right to take for said mill site from the pond of Thornton and Dunbar water sufficient to turn two water wheels with four pairs of stones not exceeding six

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feet in diameter, and the necessary machinery usually used for making flour and cleaning and screening wheat and corn, provided that there should be left to Thornton and Dunbar a sufficient quantity of water for their mill, which was known as the "Falls Mill." The land thus conveyed is part of what is known as the Knox Mill property, and it was provided that the water should be taken by a canal of sufficient width and depth to convey water for at least five over-shot wheels and from the mill seat to the river not to exceed eighteen feet in width at the bottom. By sundry conveyances prior to 1847 the title of the Hollingsworth mill site and water rights became vested in Thomas F. Knox and the title of Thornton and Dunbar to the mill pond on the Spotsylvania side of the river and of the mill known as "Falls Mill" became vested in Joseph B. Ficklen.

By a written agreement dated February 25, 1847, Ficklen sold and agreed to convey to Knox one-half of all the water power connected with, arising from or produced by the "Falls Mill" dam not theretofore conveyed to the Hollingsworths, including one-half of the water necessary for the operation of the "Falls Mill" when it was sufficient for that purpose (which was to be regarded as a first right) and if not sufficient for that purpose then one-half of the water that said dam might supply, and in addition one-half of any surplus water which might exist after satisfying said first right and the right theretofore conveyed to the Hollingsworths, the latter being designated as the second right. The said agreement further proivded that in order to ascertain the relative interests of the parties in the water power thereby conveyed, a competent person should be employed at their joint expense "to determine the quantity of water sufficient for 'Falls Mill' on its then construction," which was declared to be the same as in 1803. Alfred Duval was selected as arbitrator and on April 1, 1848, made an award in substance as follows: 1. When the water supplied by the "Falls Mill" dam exceeded eighty-five cubic

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feet per second Ficklen was entitled to twenty-two and one-half cubic feet as one-half of the first right, and to one-half of all water in excess of eighty-five cubic feet per second, and Knox was entitled to twenty-two and one-half cubic feet per second as one-half of the first right, forty cubic feet per second as the second right, and one-half of all water in excess of eighty-five cubic feet per second. The water which had been conveyed to the Hollingsworths and was then owned by Knox was sufficient to turn four pairs of stones from two over-shot wheels sixteen feet in diameter. The award fixed ten cubic feet per second as the amount of water necessary to operate each pair of stones, thus making forty cubic feet per second for the four pairs of stones. 2. When the supply of water exceeded forty-five cubic feet per second but did not exceed eighty-five cubic feet per second, Ficklen was entitled to twenty-two and one-half cubic feet per second as one-half of the first right, and Knox was entitled to twenty-two and one-half cubic feet per second as one-half of the first right, and forty cubic feet per second, or so much thereof as was available, as the second right. 3. When the supply of water was forty-five cubic feet per second, or less, Ficklen and Knox were each entitled to one-half thereof.

By deed dated June 27, 1851, Ficklen and wife conveyed to Knox "the water power sold to him by said agreement, subject to the conditions and limitations therein contained." This deed expressly refers to the agreement dated February 25, 1847, and to the Duval award made on April 1, 1848, and the said agreement and award were expressly made a part of the deed.

The Rappahannock River separates the county of Spotsylvania, which is on the south side of the river, from the county of Stafford on the north side of the river. Just above the city of Fredericksburg, which is in Spotsylvania county, the river is divided by an island known as Hunter's Island; about one-half of the river passing on each side of the

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island. In April 1851, Ficklen and Knox were joint owners of the water of the river on the south side of the island so far as they had appropriated it, and there were numerous owners of water power on the Stafford side of the river. Just what was the exact amount of the appropriation by Ficklen and his predecessors in title by the old "Falls Mill" dam, or what the capacity of that dam was, does not clearly appear from the record. The sketch below, though not drawn to scale, shows approximately the power situation at Fredericksburg at this time.

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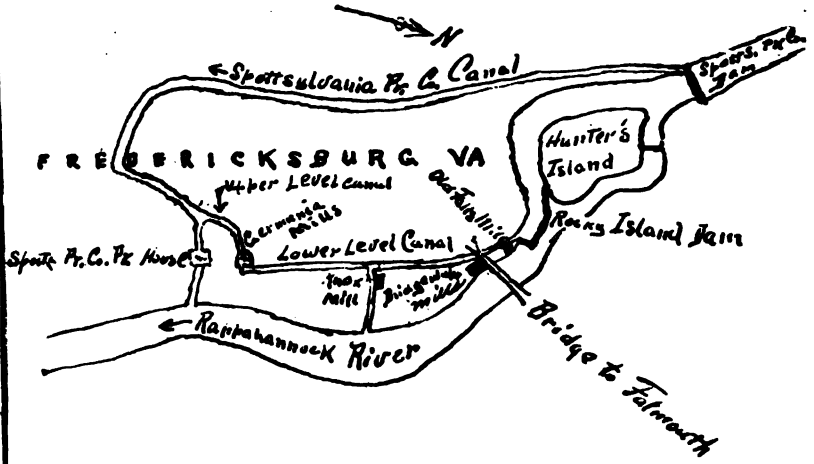
Exhibit 23



Sketch Showing
Power Situation
AT
Fredericksburg
VA.
(No Scale)

Exhibit 23A with Deposition of Cecil L. Reid

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The owners of the water power on the two sides of the river deemed it desirable that the whole power of the river should be concentrated in one hand, and George Aler and his associates undertook to form a manufacturing company for the purpose of erecting a dam across the river above Hunter's Island, and by written contract dated April 15, 1851, Ficklen and Knox and Aler and his associates, agreed that Ficklen and Knox should convey all their works and water power rights to the manufacturing company, which Aler and his associates proposed to organize for the purpose of acquiring and developing a greater fall by the construction of a new dam further up the stream, and for the purpose of operating all the water power afforded by the entire flow of the river, in consideration of which the company was to furnish Ficklen and Knox, at their respective mill sites, without cost to them, the amount of water to which they were respectively entitled, amounting, as expressly stated, to sufficient water to operate five pairs of five foot stones with the necessary accompanying machinery at the Ficklen mill site, and nine pairs of stones with the necessary accompanying machinery at the Knox mill, with the right also reserved by Ficklen and Knox to have any surplus water which might reach them from the existing old "Falls Mill" dam and race, which was below the proposed new dam. This agreement further stipulated that "whenever the water power generated by the dam of the said manufacturing company shall be so reduced during the low stages of the water in said river that one-half of the said water power shall be inadequate to furnish to the said parties of the first part (Knox and Ficklen), their respective measures of water power hereinbefore described, then, during such periods of time, that the said parties of the first part shall take and receive at their said mills from the said dam or other head of water of said company, a water power equal to the running of ten pairs of stones with accompanying necessary machinery, to-wit: Joseph B. Ficklen five pairs of stones and

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Thomas F. Knox five pairs of stones, being the estimated volume of the first or 'Falls Mill' right owned jointly by them."

In 1851 sixteen foot over-shot wheels were used at both mills and such wheels continued to be used at the Knox mill until it was burned about 1901, but some time prior to 1878 turbine wheels were substituted for the over-shot at the Ficklen mill.

In a contract made July 8, 1878, between Ficklen and the Fredericksburg Power Company, the amount of water per second necessary for each run of stones was fixed at thirteen and one-half cubic feet, and the company agreed also for a rental of $120.00 per year, to furnish Ficklen nine and one-half cubic feet per second.

The manufacturing company contemplated by the agreement of April 15, 1851, was chartered and organized under the name of Fredericksburg Water Power Company, and in 1856 Ficklen conveyed to it his interest in the "Falls Mill" dam, works and water power, but the records do not show any conveyance from Knox, or any subsequent contract between him and the said company, nor is the agreement of April 15, 1851, signed by the company. Knox, however, after the organization of said company, received the water for his mill through the works of said company and the company and its successors seemed to have been satisfied to rest their title upon the contract of April 15, 1851. The Spotsylvania Power Company is the successor in title and obligation of the Fredericksburg Water Power Company, and is obligated to furnish to the Knox mill site the amount of water called for by the contract of April 15, 1851.

The interest of Knox in the Knox mill property and its water rights has, by descent and purchase, now become vested in the appellant, Ellen C. L. Ficklen, and the Spotsylvania Power Company as tenants in common in the proportion of nine-tenths to Mrs. Ficklen and one-tenth

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to the Spotsylvania Power Company. The Knox mill burned about 1901 and since then the power company has furnished no water to that site. For some time prior to the time that it was burned it had ceased to manufacture flour and had been used for other purposes not necessary to be detailed here. The Knox mill, when in operation, for a long time operated with two over-shot wheels sixteen feet in diameter and at a later period, the exact date of which is not given, an addition was made to the mill and a third wheel of about the same dimensions was put in.

The chief question now at issue between the parties is, how much water in cubic feet per second is the Knox mill site entitled to? Knox was not a riparian owner and all of his water rights were acquired by contract. He never acquired any additional water rights after the agreement of 1851. Thornton and Dunbar's rights were only those of appropriation and it nowhere appears what was the capacity of the "Falls Mill" dam or how much, if any, it furnished over eighty-five cubic feet per second. Nor does it appear how many stones were operated by the "Falls Mill." Under the agreement of April 15, 1851, in which Ficklen and Knox are mentioned as parties of the first part, it was stipulated "that the said parties of the first part and their heirs will be content to take and receive the present measure of water power to which they are entitled *to* now and held appurtnant to their said mill sites respectively (amounting to water power equal to the running of five pairs of stones of a diameter of five feet, and necessary accompanying machinery appurtenant to the mill site of the said J. B. Ficklen, and amounting to a water power equal to the running of nine pair of stones of five feet diameter with the necessary accompanying machinery as appurtenant to the mill site of the said Thomas F. Knox) from the dam or other head of water, which may be constructed by the said manufacturing company." It was further stipulated that whenever one-half of the water power furnished by the

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company's dam should be inadequate to furnish them their respective measures of water power aforesaid, then, that during such period there shall be furnished to Joseph B. Ficklen sufficient water to run five pair of stones and accompanying necessary machinery, and Thomas F. Knox five pair of stones and accompanying necessary machinery "being the estimated volume of the first or 'Falls Mill' right owned jointly by them."

The appellant at first assails the correctness of the Duval award but finally admits that time has probably cured the defects in that award. It is then insisted that, if the award be accepted as correct, inasmuch as Ficklen, under the agreement of 1878, was accorded thirteen and one-half cubic feet per second for every run of stone under the first right, Knox for his nine run of stone is entitled to one hundred, seven and one-half cubic feet per second, but the agreement between Ficklen and the power company of 1878 was a purely private agreement between these parties, and does not affect the right of Knox in any way.

The appellant assumes that the "Falls Mill" dam impounded "practically all of the flow of the river" and says that this is evident from the diagram hereinbefore inserted. But it is by no means evident from said diagram, nor is it otherwise established by the evidence and all calculations based on the flow of the river are consequently unreliable. The plaintiff also undertakes to determine the amount of water to which the Knox mill site is entitled by testimony as to the wheel capacity of the Knox mill, as to flour produced, and as to the horse power necessary to run nine sets of stones, but in all these calculations she ignores the fact that the water rights to which the Knox mill site is entitled are not measured by the capacity of the Knox mill, but by the contracts by which the rights were acquired. These questions are dealt with and the theories of the appellant disposed of in the written memorandum of the learned judge of the trial court made a part of the record.

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We approve his conclusions except as herein otherwise stated.

All of the evidence of these various claims was produced before the master. In his report he states "voluminous depositions which are returned herewith, have been taken before your commissioner, and your commissioner has consulted many authorities and spent a great deal of time and thought in preparing his answer" on this subject. After reviewing the situation he concludes that the maximum right of the Knox mill site was sixty-two and one-half cubic feet per second, and the minimum twenty-two and one-half cubic feet per second. Exceptions were filed to his report, and the learned judge of the trial court in passing upon these exceptions, said:

"There are two questions for the decision of this court:

"1. What are the water rights appurtenant to the Knox Mill?

"2. Is the Knox Mill property and water right appurtenant to it susceptible of partition in kind?

"The commissioner to whom these questions were referred, along with others, reported that the Knox Mill was entitled to 62½ feet of water per sec. as a maximum right, and 22½ feet per sec. as a minimum right, and that the property is susceptible of partition in kind; and the questions now at issue arise out of exceptions filed by the plaintiff to these findings.

"I have read the evidence carefully and I have read the Exhibits, and I have carefully read and considered the briefs of counsel. Both sides of the case were ably argued, and the notes of argument were illuminating.

* * * * * * * * * *

"If we accept 1st, that the rights in the water power afforded by the 'Falls Mill' dam, including Knox's rights were made over, and hotchpotched at the formation of the Fredericksburg Water Power Company in 1851; and 2nd, that Knox could and did reserve to himself water rights

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which he did not theretofore own; and 3rd, if we accept the idea that those rights could be indicated by resurrecting in the imagination the old Knox Mill as it actually existed or as it appears to have existed, then there is no getting away from the conclusions counsel for plaintiff reach.

"If the title papers settle the rights of the parties, and there is nothing in them, or not sufficient to justify these theories, then we must reach a conclusion as to the rights of the parties by a fair interpretation of the papers, independently of theories which may lead us very far afield.

"Knox and his predecessors in title were never riparian owners of water power on the Rappahannock river. Whatever rights he had he, or the Hollingsworths purchased from Ficklen, or Ficklen's predecessor in title. By deed of March 3, 1803, Hollingsworth (Knox's predecessor) purchased of Francis Thornton, and others, Ficklen's predecessors in title, the present site of the Knox Mill property, and water power to be taken from the 'Falls Mill' dam, amply sufficient for two over-shot wheels, provided same should not deprive said grist mill of an ample quantity of water on her present construction, and the deed limited the Knox Mill to four pair of stones not to exceed six feet in diameter. Hollingsworth was required to construct and keep in repair the race way from 'Falls Mill' to the Knox Mill, as it will hereafter be called for brevity. And the canal was to be dug amply large to convey water for at least five overshot wheels. It will be noted in passing that this canal was entirely out of proportion in size to the amount of water to be furnished the Knox Mill.

"The sum total of the Knox Mill purchase however is water for four pair stones not exceeding six feet in diameter, and accompanying machinery.

"By agreement of Feb. 25, 1847, Ficklen, then owner of 'Falls Mill', agreed to sell to Knox one-half of all water power connected with and arising from or produced by said grist mill pond, and not heretofore conveyed to Hollings-

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worth (Knox Mill) including one-half of water sufficient for the 'Falls Mill' whenever the quantity of water afforded by the pond may be enough for that purpose, and when not, then one-half of what it may afford, which is the first right, as well as one-half of any surplus which *may* at *any time* exist after satisfying the said first right and the right heretofore conveyed to Hollingsworth as aforesaid, which is the second right. But none of the water power sold said Hollingsworth *shall* be used on the premises of said Ficklen, &c., and this same agreement provides for the employment of a competent person to ascertain the relative interests of the parties in the water power. Pursuant to this latter clause Alfred Duval, millwright and engineer, was employed to carry out the agreement in this respect.

"It is beyond the province of any court at this late day to say whether Alfred Duval's award of water power was correct or incorrect. The award was made nearly three-quarters of a century ago; it was accepted by the parties over their own signatures and rights of third parties have more than once attached to the rights so established.

"That award evidently converted or translated water sufficient to run a certain number of burr stones into cubic feet of water per sec. for he says (referring to Oliver Evans' Treatise on Hydraulics) that the quantity of water necessary to be used to propel four pair of stones and machinery, is forty cubic feet per sec. discharged on over-shot wheels sixteen feet in diameter.

"He found that Knox was entitled to, under the Hollingsworth purchase of 1803, water sufficient to run four pair of six feet stones and machinery, and he translated this into forty cubic feet of water per sec. Ficklen had, as set out above, sold Knox one-half of all the water power connected with, or produced by the 'Falls Mill' dam, not theretofore conveyed to Hollingsworth (with provision for low water), and this amount Duval apparently ascertained to be on a fair average (for it must be remembered, or it is

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at least to be presumed that he was measuring and dealing with the whole power furnished by the 'Falls Mill' pond) forty-five cubic feet per second, of which Ficklen was entitled to one-half or twenty-two and one-half cubic feet per sec., and Knox was entitled to a like quantity, and that Knox as a second right owned forty cubic feet per sec. the 1803 Hollingsworth purchase. He then adds that Messrs. Ficklen and Knox own jointly and equally the residue of the water, *after* the said first and second rights are supplied. Now there is no question as to what the Knox Mill is entitled in cubic feet per sec. as translated from water to turn a certain number of stones, under its first and second rights in the power afforded by the Falls Mill pond up to this stage of the proceeding. In other words, when the whole power of the pond was only equal to eighty-five cubic feet per sec. then Ficklen could only discharge twenty-two and one-half feet per sec. and Knox only sixty-two and one-half feet per sec. and when the whole quantity was reduced to forty-five feet per sec. or less, then both Ficklen and Knox were required to reduce their orifices of discharge so as to cause equal discharges in equal time. The one-half interest which Knox owned in the water power afforded by the Falls Mill pond over eighty-five cubic feet per sec. was an indefinite and uncertain thing even at the time of the award. Whether it really ever afforded more than eighty-five cubic feet per sec. is not shown by the record with any sort of satisfaction. There is a provision for a division of the flow if it ever fell to, or below forty-five cubic feet per sec. and this finding by the arbitrator was necessary because of the title papers. But the record in this case really throws no light on what this third right of the Knox Mill was, under the Duval award.

"We come now to the agreement of April 15, 1851. Under this agreement the foundation was laid for the incorporation of the Fredericksburg Power Company, predecessor in title to the present defendant.

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"It is argued and contended by counsel for plaintiff that the parties who entered into this agreement pooled or hotchpotched their interests, and that Knox by some means came out of the deal with a right of from one hundred and sixty to one hundred and eighty cubic feet of water per sec. or thereabout. A fair construction of the title papers doesn't justify any such conclusion. Ficklen and Knox had nothing to put into the pool but the 'water power of the (Rappahannock) river which is now owned by them at their respective mills,' meaning of course the water power afforded at the Falls Mill dam, the only indefinite thing about which was what the pond may afford in water over and above eighty-five cubic feet per sec. if it afforded any water over this amount at any time. That Ficklen and Knox came out after the agreement only with what they went into it, with the exception that they were relieved from the expense of keeping up a dam and race ways, and had their water delivered to them free of charge, is evidenced by the fact that they declare over their signatures 'that in the event that the said manufacturing company be formed and organized and shall proceed to execute the purpose before described, then they the said parties of the first part and their heirs will be content to take and receive the *present* measure of water power to which they are entitled to *now*, and hold appurtenant to their said mill sites respectively, amounting to a water power equal to the running of five pairs of stones of a diameter of five feet and the necessary accompanying machinery as appurtenant to the mill site of J. B. Ficklen, and amounting to a water power equal to the running of nine pairs of stones, five feet in diameter with the necessary accompanying machinery as appurtenant to the mill site of the said Thomas F. Knox.' As Knox, who was not a riparian owner had no right to water power except such as he had purchased, and as he had purchased nothing since the Duval award, agreed to take from the proposed manufacturing company the *present* measure of

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water which he was entitled to *now*, the only reasonable conclusion is that he and those contracting with him were converting back into power to run a certain number of stones the same power which Mr. Duval expressed in cubic feet of water per sec. Our task now is to translate that back into cubic feet per sec. and we must do this according to the method followed by Duval, since his conclusions were the basis of the agreement of the parties at the time the transaction was consummated.

"If I am correct in this we have:

"The Knox Mill entitled as a first right to 22½ cubic feet per second.

"And as a second right to 40 cubic feet per second.

"Total 62½ cubic feet per second.

"And as a third right, if we can get anything definite to base the calculation upon to one-half of the power afforded by the Falls Mill dam (when and if it afforded any such power) in excess of eighty-five cubic feet per sec. The nine pair of five foot stones represented this power whatever it was. Counsel for complainant claim first, that it takes thirteen and one-half cubic feet per second for each five foot stone and accompanying machinery, and second that the Knox first right twenty-two and one-half cubic feet per second, and his third right, that is the power in excess of eighty-five cubic feet per second, were combined in the contract of 1851, giving Knox a first right of power to run five pair of stones and necessary machinery or according to their calculation sixty-seven and one-half cubic feet per second, as a first right, and in addition to this they claim as a second right that Knox is entitled to power to run four five foot stones (the Hollingsworth purchase of 1803). Duval calculated a run of five foot stone and machinery to require ten cubic feet per second to each run of stone. Knox and Ficklen accepted this as correct and agreed to be *content* to take the water they are getting *now* which is equivalent to saying that they were willing to take ten

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cubic feet per second for each run of five foot stone. So that the claim of thirteen and one-half cubic feet per second or any amount above that is not justified by the title papers or any pertinent evidence in the case, at best admitting that Knox is entitled as a first right to power for five pair of five foot stones, after combining his first and third rights and making a first right of the two, Knox could only claim as a first right expressed in cubic feet per second, fifty cubic feet, and on his second right he could claim only forty cubic feet per second making a total maximum to which he would be entitled of ninety cubic feet per second, and a minimum of forty cubic feet per second.

"But what is there in the Duval award and the contract of 1851, or both, and they must be read together because they are linked together by unmistakable language of the parties themselves, to justify the assumption that the first and third Knox rights were combined to make the five pair of five foot stones power referred to in the contract of 1851. The contract doesn't say so. It distinctly says, after stating that the parties would be content to take the water which they are accustomed to take *now*.

"'*Ficklen as a first right* power for five pair of five foot stones and Knox five pair of five foot stones.'

"Knox was never, according to his own solemn agreement, entitled to but twenty-two and one-half cubic feet of water per second, under this right, and there is nothing in the contract to justify either the assumption that it had increased or that the first right and third right had been combined. On the contrary, it is significant that the water over eighty-five cubic feet per second afforded by the Falls Mill dam, or the Knox third right is nowhere referred to in the contract of 1851. The first right is specifically mentioned, and the second right is referred to, but the third right is not alluded to anywhere.

"Under the contract of 1851 the twenty-two and one-half cubic feet per second or first or Falls Mill right is converted

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into power to run five pair of stones, and the remaining forty cubic feet per second was evidently left as it was heretofore contracted at the time of the purchase by Hollingsworth in 1803, that is it was converted back into the same power which was originally contracted for, viz., power to run four stones.

"This would indicate that these parties took little or no account of the water afforded by the Falls Mill pond over eighty-five feet per second and I think the fair presumption is that if there was any such power, it was only such as arose in flush water or such as was above normal, and uncertain and therefore of little value.

"These conclusions negative the contentions that Knox hotchpotched his rights, and drew out more than he put in. and that Knox reserved to himself rights that he did not own and that the way to ascertain the extent of his right was to erect in the imagination the old Hollingsworth or Knox Mill. The reasons for not accepting the first two contentions have been fully set out in the foregoing pages. Knox was not a riparian owner and he had nothing to put into hotchpotch except what he had purchased, and could take out nothing except what he owned unless someone granted him further rights. There is no grant of any further rights. On the contrary, the contract of 1851 expressly limits what he is entitled to under the contract to water to which he is now entitled. The Knox Mill which has been resurrected in the imagination can throw no light on what power the Knox Mill is entitled to because the power was absolutely fixed by that afforded by the Falls Mill dam or pond and not by the size of the Knox Mill.

"For many years before its destruction in 1901, the Knox Mill was not used for grinding flour. What sort of machinery was used there for thirty years is not shown. How much power it took to drive this machinery is not shown. How much power was leased, if any from the Fredericksburg Power Company in addition to that which the com-

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pany was under obligation to deliver free is not shown. Indeed there is nothing in the record which throws any light whatever on the amount of power which the Falls Mill pond may have afforded above eighty-five cubic feet per second.

"If it were not for the fact that the contract of 1851 expressly converts the twenty-two and one-half cubic feet per second owned by Knox as a first right, into power to run five pair of five foot stones, the court might be justified in concluding that the power to run nine pair of stones to which Knox was entitled was equivalent to ninety cubic feet of water per second, as Duval in all his calculations had allowed ten cubic feet per second to each pair of stones, but since the power to run the original four stones purchased by Hollingsworth had been definitely converted into forty cubic feet of water per second and the parties themselves had by the contract converted the twenty-two and one-half feet per second into power to run five pair of five foot stones the power to run the nine pair of stones to which Knox is entitled under the contract is made up as follows:

"First right, five pair of five foot stones,	22½ cu. ft. per sec.
"Second right, purchased in 1803 four pair stones,	40 cu. ft. per sec.
"Total,	62½ cu. ft. per sec.

"The result seems somewhat inconsistent, but we are at least holding the parties as prospective grantors, to the language they chose to express their meaning, rather than wandering into the realms of speculation as to what they meant by assuming that two rights were combined without any language to justify it, or without resurrecting the old Hollingsworth Mill, in an effort to shed light upon the question. For the foregoing reasons the exceptions to the commissioner's report on this branch of the case is overruled."

We are unable to concur in so much of the foregoing opinion as gives the Knox Mill site as a maximum only sixty-

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two and one-half cubic feet of water per second and thereby reaches a result which is "somewhat inconsistent."

The Duval award fixed the *first* right at the "Falls Mill" dam, as between Knox and Ficklen, at forty-five cubic feet per second, which was to be equally divided between them, the *second* right, wholly the property of Knox, at forty cubic feet per second, and determined that all water afforded by the dam in excess of eighty-five cubic feet per second was to be equally divided between them. The last mentioned right, which may be called the *third* right was of indeterminate quantity and value, and it was natural that, when the parties were transferring all of their property in the water to a third person, they should eliminate this item of uncertainty and fix a value thereon to be paid by their grantee. This they accomplshed by the agreement of 1851, which changed the value of the *first* or "Falls Mill" right, although it made no mention of the *third* right and assigned no reason and stated no consideration for the enhancement of the value of said first right. The agreement of April 15, 1851 between Ficklen and Knox on the one side and the parties who were to organize the Fredericksburg Power Company on the other, fixes a new and different quantity of water as the value of such first right, to-wit: "A water power equal to the running of ten pair of stones, with accompanying necessary machinery, to-wit, Joseph B. Ficklen five pair of stones and Thomas F. Knox five pair of stones *being the estimated volume of the first or 'Falls Mill' right owned jointly by them.*" (Italics supplied). Whatever may have been the quantity previously deliverable under this first right, the agreement of 1851 fixed it for the future at five pair of stones each to Ficklen and Knox. The agreement also fixed the maximum quantity of power to be furnished to Knox and Ficklen—Knox was to have sufficient power to run nine pair of stones and Ficklen five. Duval, by his award, fixed the unit of power for each pair of stones at ten cubic feet per second and in the

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deed from Ficklen to Knox dated June 27, 1851, conveying to the latter the rights conferred by the agreement of February 25, 1847, the Duval award is made a part thereof, and we do not doubt that in fixing the power to run each pair of stones in the agreement of April 15, 1851, the parties had in mind and dealt with reference to the unit of power fixed by Duval, to-wit: ten cubic feet of water per second. Taking this as a basis, we find that the Knox Mill site is entitled to receive as a maximum, under "the first or 'Falls Mill' right," power for five pair of stones, or fifty cubic feet per second, and under the second or Hollingsworth grant power for four pair of stones, or forty cubic feet per second, or in the aggregate for the two rights ninety cubic feet per second. Under the same agreement of 1851, the Ficklen property, now the Bridgewater Mills property, was to receive power for five pair of stones, or fifty cubic feet per second, but the contract provided that whenever one-half of the power generated by the dam of the company was not sufficient to furnish to Knox and Ficklen their respective measures of water power hereinbefore described, then during that period there shall be furnished to each Knox and Ficklen a water power equal to the running of five pair of stones. The minimum, therefore, to which the Knox Mill property is entitled is fifty cubic feet per second. As to this minimum and the water to be furnished the Ficklen or Bridgewater Mills property, the agreement contains no limitations upon the power capacity of appellee's dam. We are of opinion that the Knox Mill site is entitled under the agreement of 1851 to ninety cubic feet of water per second as a maximum rate under the conditions hereinbefore stated, and to a minimum rate of fifty cubic feet per second.

It is assigned as error that the trial court held that the water power could be separated from the land and that it was susceptible of partition in kind between Mrs. Ficklen owning a nine-tenth's interest and the Spotsylvania Power Company owning a one-tenth interest.

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The first bill of the complainant prayed "That the said real estate, together with all water and other rights, easements and privileges and benefits thereto appertaining be partitioned between the parties entitled thereto, or in the event that such partition be impracticable that it be sold and the proceeds divided among those entitled thereto according to their respective rights." In this prayer the appellee united and the enquiry submitted to the master was "whether the said real estate and water rights attached thereto is practicable for partition in kind between the respective owners." The evidence on the question was conflicting, but the master reported "that both the real estate and also the water rights attached thereto are susceptible of a practical partition in kind between the respective owners thereof. The defendant owns real estate adjoining the real estate which is the subject of this suit and one-tenth thereof could be readily apportioned to said defendant and nine-tenths thereof to the plaintiff without injury to the rights of either. The defendant owns the head of water and water works supplying the same, and said power is susceptible of practical division in kind, the defendant retaining one-tenth and delivering nine-tenths thereof as defined under response to enquiry No. 4 hereunder, without impairing the value of the several portions. The smaller interest is the only one that could suffer, if any, according to the evidence, and the owner of the same requests such division in kind." The ruling of the trial court thereon was as follows: "The commissioner has found after hearing all the evidence that the whole property is susceptible of partition in kind, that is the real estate and the power. This being true and there being a conflict of the evidence, this court does not feel justified in sustaining the exceptions to this finding."

There is nothing inherent in a water power which prevents a partition thereof in a proper case. "As a general rule, water power or the right to take and use running water for a particular purpose may be actually divided among the

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co-proprietors thereof." 21 Am. & Engl Encl. Law (2nd ed.) 1161. In 40 Cyc. 741, it is said "A water right may be the subject of a voluntary or judicial partition under suitable circumstance." What are suitable circumstances is well illustrated in *Cooper* v. *Cedar Rapids Co.*, 42 Iowa, 398; *Doan* v. *Metcalf*, 46 Iowa, 120; *Roberts* v. *Clement Ry. & L. Co.*, 74 N. H. 217. The circumstances of this case, however, do not render it necessary to go into any discussion of this question. The finding of the commissioner is to be interpreted in the light of the language used in the order of reference to which he is responding, and as we interpret his report, he found that the real estate and the water rights attached thereto were susceptible of convenient partition in kind between the parties entitled thereto; and the trial court overruled the exceptions of the appellant to that report and confirmed it. Whether or not the partition was practicable was a question of fact to be determined from the evidence in the case, and the commissioner, upon conflicting evidence, found that it was. The rule in this court is that, where the evidence is conflicting, this court will not reverse the action of the trial court overruling an exception to the report and confirming it, unless the finding of the commissioner is clearly erroneous. *Howard* v. *Gose*, 112 Va. 555; *Shipman* v. *Fletcher*, 91 Va. 473. The case in judgment is not one in which the judgment of the trial court on this question, should be disturbed.

It is assigned as cross-error by the appellee that the court held that the appellee was obliged to furnish the appellant for use elsewhere than at the Knox Mill site, the amount of water which Knox was entitled to have delivered at said site, and that this was error because the water was appurtenant to the mill which had been burned in 1901, and as there was no longer any mill on the premises, the appellee could not be compelled to deliver the water there to be carried thence for a different use at another place.

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No restriction was put upon the use of the water when it was granted. Thornton and Dunbar, who owned and operated the "Falls Mill," in consideration of five thousand dollars, sold and conveyed to the Hollingsworth brothers, a mill site of an acre and a half of ground and water to be taken from their "Falls Mill" dam sufficient to run two over-shot wheels to turn four pair of stones not exceeding six feet in diameter. This was simply a measure of the water to be delivered, and not a restriction or limitation upon the manner of its use or where the grantees should take it after delivery to them. 41 Cyc. 752. The purpose of the purchase was for the erection of a flour mill and such a mill was in fact erected on the site purchased and operated for many years. As stated, no restriction was placed on the use of the water in the original grant or in any of the subsequent deeds of the property, and as the grantees were to engage in the same business that the grantors were then engaged in, and to become their competitors, it will not be presumed that the grantors intended to restrict the use of the water to that particular point or for that purpose. The grantors purchased the fee simple in the land and water, without restriction or limitation of any kind, and it would seem that five thousand dollars in 1803 was a large price to pay for it. Furthermore, if any such restrictions as are now claimed could ever have been implied from the grant of 1803, they would seem to have been removed by the agreement of 1847 between Ficklen and Knox, the then owners of the "Falls Mill" property and the Knox Mills property. By that agreement Knox purchased of Ficklen one-half of the remaining water right of the "Falls Mill" property, with the right to convey it to his mill "or wherever else he may wish to use it, not on the premises of said Ficklen." It was "further agreed that no water shall be used at the 'Falls Mill' after the present year, but the said mill and other houses may be moved or otherwise used as the said Ficklen chooses, the said Knox having no interest in them, and the

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race leading to the said 'Falls Mill' shall be then stopped up at the joint expense of the parties. It is further agreed that, with a view to the use of the said Ficklen's portion of the water by him or his assigns below the bridge, if he shall choose to do so (though he may use it wherever he chooses not on the premises of said Knox) provided none be used at the "Falls Mill' etc." The object of this agreement was to get rid of the "Falls Mill" entirely and apparently to forbid both parties to use the water from the "Falls Mill" dam on the "premises of the said Ficklen" or at the site of the "Falls Mill." Certainly the use of the water then purchased was not limited to the Knox Mill property, as he is expressly granted the power to convey it "wherever else he may wish to use it." This contract when read as a whole would seem to indicate that none of the water involved was regarded as restricted in its use to any particular piece of land. Text writers generally lay down the law as we have stated it and cite abundant authorities to support them. For instance, it is said in 40 Cyc. 751, 752, 753, "In the absence of specific restrictions in the grant of a water power the grantee may make such use of the water as he chooses, provided only that he does not thereby interefere with the rights of others, but the grantor may specifically restrict the use for which the water may be employed, and when this is done it is an effective limitation upon the rights of the grantee. * * * There is no restriction as to place where water or power granted shall be employed or enjoyed unless specified in the conveyance or contract. * * * *

"In a grant of a certain quantity of water or water power or so much as may be sufficient for the operation of the particular plant or the conduct of a particular business, the specification of the purpose for which it is to be used, is usually taken as a measure of the quantity rather than as a limitation of the use, and the granteee is not bound to use it in the particular manner described, but may use it in a

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different manner, for a different purpose, or at a different place, or increase the capacity of his machinery, provided only that the quantity used is not increased."

In 27 R. C. L. 1248, sec. 158, it is said: "In granting water rights the purpose for which they are to be used is frequently mentioned, and the question then arises as to whether or not the grant is limited to that use. In considering this question it must, of course, be conceded that the grantor is entitled to restrict use to specified purpose, but in construing a provision in the grant of water power limiting the use to be made thereof, it has been customary for the courts to adopt a liberal construction and to favor that interpretation which will be least burdensome to the grantee. That interpretation should always be preferred which will give the grantee an unrestricted, rather than a limited, right to the quantity granted, for such a construction is more beneficial to the community, and to the grantee, and can seldom injure the grantor. It may therefore be stated as a general rule that wherever the wording of a deed makes it doubtful whether a limitation of the quantity of water power, or a restriction of the use of the water power is contemplated, the courts will adopt the former construction. Ordinarily a mere mention of a particular use is not of itself sufficient to make that use exclusive. Nor will a construction which would restrict the grantees to the specific use to which the water was first applied be adopted unless the language of the grants unmistakably indicates that this was the intention of the parties."

The appellant is proposing to convey her share of the Knox Mill water to property now owned by her, but which was part of the Ficklen property in 1847. This is objected to by the appellee because by the agreement of 1847 Knox was forbidden to carry the water he obtained by that agreement "on the premises of said Ficklen." The appellee is not the owner of, nor interested in, the Ficklen premises

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upon which Knox was forbidden to carry the water, and hence cannot be heard to raise that objection.

This disposes of all the questions raised which we need consider. The trial court erred in fixing the amount of water to which the owners of the Knox Mill property are entitled to have delivered by the appellee. To this extent the decree of August 14, 1920, will be reversed and the cause remanded to the circuit court of Spotsylvania county with directions to conform its decree to the views hereinbefore expressed. Costs will be decreed in favor of the appellant.

Reversed and remanded.

GIBSON, ET AL., v. COMMONWEALTH.

(*Wytheville, June 15, 1922.*)

1. APPEAL AND ERROR.—Amendment of Error—Sufficiency—Code, sec. 6346.

Error to Corporation Court of city of Charlottesville.

Affirmed.

E. O. McCue and *Fife & Pitts*, for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile*, for the Commonwealth.

KELLY, P.:

W. H. Gibson, George Shiftlett, Kinley Shiflett and David Shiftlett were separately indicted, but, at their request, jointly tried upon a charge of transporting ardent spirits contrary to law. Each of them was found guilty and sentenced to serve a term of one month in jail and to pay a fine of $50.00.

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This writ of error was allowed under the statute providing for appeals of right in criminal cases. The only assignment of error in the petition is as follows:

"Your petitioners represent that the court erred in its instructions to the jury, as will be pointed out in your petitioners' brief to be hereafter filed in this cause."

The case was submitted to us without oral argument, and no brief other than the petition was filed on behalf of the defendants. The assignment of error above quoted was clearly insufficient under section 6346 of the Code and Rule 2 of this court. *Lorillard Co.* v. *Clay*, 127 Va. 734, 746-7, 20 Va. App. 648; *Va. I. C. & C. Co.* v. *Odle's Admr.*, 128 Va. 280, 305

If the question of the sufficiency of this assignment be waived, no error is disclosed in the record to the prejudice of the defendants. The penalty imposed upon them was the minimum for the violation of the prohibition law, and no other verdict than fixing their guilt could have properly been found under the evidence. This being true, if there were any error in the instructions, it would be harmless. *Hanger* v. *Commonwealth*, 107 Va. 872, 874.

Affirmed.

GREEN *v.* COMMONWEALTH.

(*Wytheville, June 15, 1922.*)

1. CRIMINAL LAW.—Assault and Battery—Evidence—Alibi—Question for Jury—Robbery—Sufficiency of Evidence—Securing Dominion of Absolute Control of Property.

Error to Circuit Court of Chesterfield county.

Reversed.

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Wm. F. Denny and *C. A. McKenzie*, for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile*, for the Commonwealth.

BURKS, J.:

The plaintiff in error was convicted of robbing Mrs. Lillie Priddy, and sentenced to the penitentiary for eighteen years.

The petition for the writ of error is so inartificially drawn that it is difficult to say what errors are assigned. Giving the petitioner the benefit of all doubt on this question, he assigns as error that the verdict is contrary to the evidence, and possibly that there was error in not compelling the Commonwealth to produce a receipt for $2 from the A. & B. Clothing Co., given to the accused on the day of the alleged offense, and which he had on his person when arrested, but was taken from him and was not produced at the trial.

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The defendant entered a plea of not guilty, but his whole defense was an alibi, which he offered testimony to prove. The testimony for the Commonwealth of his presence and of the assault and battery upon Mrs. Priddy is direct and positive, and hence the verdict of the jury upon this point is conclusive upon this court. This, however, did not relieve the Commonwealth of the burden of proving the robbery beyond a reasonable doubt. The only witness who testified as to the alleged robbery was Mrs. Priddy. Her account of what took place is substantially as follows: About 3:30 o'clock on the afternoon of May 14, 1921, she was walking along a private road, in Chesterfield county, leading from her father's house into the public road to Stop 17 on the Richmond-Petersburg electric line; that she saw the accused approaching from the direction of Stop 17 at a distance of about a city block; that at the time she had

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her pocket-book in her hand in which there was a ring of the value of $30, a fountain pen of the value of $2 and $3.75 in money; that when she saw him approaching, she from force of habit wrapped the chain of the pocket-book around her wrist; that as he passed her, distant about five feet, he tipped his hat and said, "Good evening," just as politely as you please; that just after he passed her he struck her "right down across the neck and shoulder with a stick;" that she must have been unconscious for a minute or two, and when she came to herself he was standing over her. and she thought he was going to choke her and she kicked him with both feet between the knee and hip; that she began screaming and he ran off up the road in the direction from which she had come. She further testified that the chain of the pocket-book was not broken before she fell, and that "I had it in this hand and it fell across the road and I was lying across the road, my shoulders were in the mud in a rut," and that she did not know how the pocket-book was taken from her hand. On cross-examination, she testified as follows:

"Q. When the pocket-book was found there, it had the ring in it, didn't it?

"A. Had everything in it.

"Q. There wasn't anything taken from the pocket-book?

"A. There was nothing taken from it.

"Q. Did you see him put the pocket-book down?

"A. No, I did not.

"Q. Didn't see him with it at all, did you?

"A. No, I did not.

"Q. Did you know whether the pocket-book fell from your hand?

"A. No, it didn't fall.

"Q. How far was it from you when it was picked up?

"A. Just right across the road.

"Q. I asked you how far it was?

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"A. I don't know how far it was. I think it was about 5 or 6 feet.

* * * * * * * * * *

"Q. Mrs. Priddy, do you know whether or not this pocket-book was taken from your hand, or whether it fell when you fell?

"A. It must have been snatched from my hand because it could not have fallen because I had the chain wrapped around my wrist just like this (demonstrating) and somebody pulled the pocket book and broke the chain."

Of course, if she was unconscious at the time she could not know, and her answer to the question was a mere opinion, conclusion or deduction, which she had no right to give. The only fact stated is that she had the chain wrapped around her wrist and that the chain was broken. There is nothing in the record to indicate what the strength of the chain was. The testimony does not show that the accused ever, for a moment of time, had the pocket-book and its contents in his absolute control. The testimony of Mrs. Priddy if credited by the jury, showed a very violent assault and battery upon her by the plaintiff in error, but does not establish a robbery.

Robbery is the taking, with the intent to deprive the owner permanently, of personal property, from his person or in his presence, against his will, by violence or intimidation. Clark's Cr. Law (3d ed.) 373; 2 Bish. Cr. Law (7th ed.) pp. 654, 655. The taking must be the securing dominion or absolute control of the property. The absolute dominion must exist at some time, though it be only momentary. Clark's Cr. Law (3d ed.) 337-8. "Again, in robbery, as in larceny, there must be an asportation. Consequently, if the one assaulted merely drops the thing, the other, who is apprehended before he takes it up, does not commit robbery. And, says Lord Hale, 'if A have his purse tied to his girdle and B assaults him to rob him, and in struggling the girdle breaks, and the purse falls to the ground, this is

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no robbery, because no taking. But if B take up the purse; or, if B had the purse in his hand, and then the girdle break, and striving lets the purse to the ground and never takes it up again, this is a taking and robbery." 2 Bish. Cr. Law (7th ed.) sec. 1161.

The testimony in this case does not measure up to these requirements, hence the judgment of the Circuit Court of Chesterfield county must be reversed, the verdict of the jury set aside, and the case remanded to said circuit court for a new trial.

Reversed.

HARRIS *v.* COMMONWEALTH.

(*Wytheville, June 15, 1922.*)

1. LARCENY.—Evidence—Identity of Accused.
2. RECORD.—Sufficiency—Omission of Certain Instructions—Appeal and Error.
3. IDEM.—Evidence—Cross-Examination by Commonwealth — Statements by Commonwealth's Attorney—Reversible Error—Presumption of Innocence.

Error to Corporation Court of city of Norfolk.

Affirmed.

Page, Page & Page and *N. T. Green,* for the plaintiff in error.

Attorney General John R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile,* for the Commonwealth.

WEST, J.:

The plaintiff in error, Charles D. Harris, was convicted under an indictment charging him with stealing six hundred and fifty-five dollars from the Seaboard National Bank of

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Norfolk, Va., and sentenced to serve a term of five years in the penitentiary. The case is here upon a writ of error to that judgment.

On July 18, 1921, the plaintiff in error, Charles D. Harris, and a small man, who was bareheaded and in his shirt-sleeves, entered the lobby of the Seaboard National Bank, where a large number of the patrons of the bank were being waited on by its employees. When T. W. Morse, one of the paying tellers, left his cage to get some change for a customer, H. F. Atkinson, the small man, who was standing near-by, walked up to the side window of the paying teller's cage and put his hand through, under the grate-work of the window, and took several packages of money which contained $655, and turning to leave, touched the plaintiff in error, who was standing with his back to the cage and about five feet from the window, and said, in an undertone, "everything is all right," and the two walked out of the bank together. H. F. Atkinson saw the small man pull his cap from his pocket, which aroused his suspicion. He then called R. P. Wingfield, an employee of the bank, and told him what had occurred, and they followed the two men, losing sight of them as they left the front door of the bank until they reached the corner of Fayette street, a distance of about thirty feet, when they saw the two men, about forty-five feet down Fayette street, walking towards Water street, and exchanging something. Atkinson, pointing to the small man, asked Wingfield if that man worked at the bank, to which he replied, "No." Just as Atkinson raised his hand to point them out, one of them looked back, and immediately both men ran, and Wingfield chased them down Fayette street into Water street, where they ran among some box cars and were lost sight of for a few minutes, the small man going towards the wharf and making his escape, and the accused running through the store of Hurst & Son and hiding behind two spools of wire at a junk pile. A few minutes later the accused left the junk pile, leaving his hat

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behind, and, to elude his pursuers, climbed a telegraph pole and went through an open window on the second floor of a store building, and then downstairs into a lane and back towards the water front, where he was caught by W. M. Fuller; whereupon, he exclaimed: "Turn me loose, turn me loose. I ain't got no money." And to Fuller's question, "What did you do with it?" he replied, "I dropped it." When Fuller first saw him he had a package in one hand and his hat in the other.

The foregoing facts were testified to by the witnesses for the Commonwealth; while the prisoner, the only witness sworn in his behalf, testified as follows: He arrived in Norfolk from Philadelphia that morning at 10 o'clock; that he was a bricklayer by trade, and had some tools which he had left in a cigar store, but he could not tell where the cigar store was; that he got something to eat and walked around looking for work, and when he reached Fayette street two gentlemen (Wingfield and Atkinson) came running out and said: "There they go now, catch him"; that accused started running and chased the two men pointed out by Wingfield and Atkinson. Accused further testified that he chased the larger of the two men down the street towards the river, up the river and around and through a scrap-iron pile, and then came up another street and went through a building; that about twenty-five men came running down the alley and hollowed: "That is him, catch him!" and because he was a stranger he ran and climbed a telegraph pole and went through a window into a building and downstairs, and was caught by a colored man. He denied that he was ever in the Seaboard Bank.

Wingfield and Atkinson denied the statement of the accused that the accused started in pursuit of the two men on Fayette street with Wingfield.

The first assignment of error is to the refusal of the court to set aside the verdict of the jury and grant a new

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trial on the ground that the verdict is contrary to the law and the evidence.

It is manifest that the foregoing evidence of the Commonwealth, considered along with the testimony of the accused, with all of its inconsistencies, and his own guilty conduct, was ample to satisfy the jury beyond a reasonable doubt that the accused and the "small man" referred to in the evidence were partners in the crime; that the accused was present and acting jointly with the "small man"—standing by and watching—while the crime was being committed, and received his share of the money.

There is no merit in this assignment of error.

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Four assignments of error relate to the action of the court in refusing to give a certain instruction asked for by the plaintiff in error, and the giving of three certain instructions over his objection.

The Attorney General's brief states that all the instructions given by the court do not appear in the record, and this is not denied by counsel for the accused. The rulings of the trial court are presumed to be correct, unless the contrary appears from the record. The rule is that the record should show in terms, or by clear inference, that the instructions found in the record are all the instructions that were given by the trial court, and the record in the instant case does not meet this requirement. The court may have refused to give the instruction in question on the ground that the same was covered by some other instruction that was given, but which does not appear in the record. The party asking a reversal for refusal to give an instruction must show by the record that there was no justification for refusing to give it, which he may do by bringing up all the instructions, or by having the court certify that the point was not covered by any other instruction. *Teter* v. *Ins Co.*, 74 W. Va. 344.

The error complained of in the instructions granted may have been cured by other instructions which were given.

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In any event, the rule of this court is that before we could properly hold that the giving of the instructions complained of constituted reversible error, in a case where all the instructions were not certified, it would have to appear that the instruction in itself, was vitally wrong and that the other instructions could not have cured the error. *Lysle Milling Co.* v. *Hold & Co.*, 122 Va. 573, 15 Va. App. 474.

We see nothing in the instructions given to indicate that the errors complained of, if errors they were, could not have been cured in the manner suggested, and decline to review the rulings of the court refusing or granting instructions.

The remaining assignments of error relate to the action of the Commonwealth's attorney in making certain remarks and asking certain questions during the progress of the trial, as follows:

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1. He asked the accused on cross-examination: "Is it not a fact that you belong to an association of bank robbers?" The prisoner's counsel objected, and the attorney for the Commonwealth asked him: "Do you object to my going into his record?" and then withdrew the question. Whereupon, the court instructed the jury to disregard it.

2. The Commonwealth's attorney said to the prisoner: "I am going to put you on your guard, that you were present and called one of these men away, when Mr. Hurst was present"; this statement being made after the Commonwealth's attorney had asked the accused: "Did you see Mr Hurst in jail in conversation with Ernest P. Graham and B. W. Ennis the day he was there before your trial in the police court"? and to which the accused had answered, "No sir, I didn't." The court thereupon instructed the jury to disregard any remarks of counsel, and to pay attention to the evidence which comes to them under the sanction of an oath, adding that the mere fact that the witness was put on his guard is not to be accepted by the jury as proving anything, one way or the other, until evidence is brought forward to that effect.

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3. The Commonwealth's attorney asked the accused: "When was the first time you ever took up your permanent abode in the country"? and remarked, "You are showing pretty well that you are a city boy now, and a very smart one." The accused replied, "I live in the country now."

4. The Commonwealth's attorney asked Ernest P. Graham the following question: "State whether or not Chas. D Harris, the defendant here, asked you to arrange, in consideration of the payment to you of $1,000, to have a colored man by the name of Wm. Fuller fail to identify him as the man he saw running with the package in his hand on July 18, 1921, and in further consideration of which he, Chas D. Harris, was to pay Fuller $50, and was to return to the Seaboard National Bank $665, alleged to have been stolen"? The Commonwealth's attorney also asked Witness Graham if Harris made such a proposition to him, and he replied "No, sir." The court, thereupon, instructed the jury to disregard this matter, as it was not satisfactorily shown that anything done by Graham was at the instance of the accused.

A new trial will be granted when it plainly appears that the statement of the Commonwealth's attorney complained of was highly prejudicial to the accused and that the trial court refused to instruct the jury to disregard it. *Jesse's Case,* 112 Va. 887, 5 Va. App. 373.

In *Mullins' Case,* 113 Va. 792, 6 Va. App. 626, and in *McCoy's Case,* 125 Va. 778, 18 Va. App. 440, this court granted new trials because of improper arguments by the attorney for the Commonwealth, which the trial court permitted, over the protest of the prisoner's counsel, and without instructing the jury to disregard them. But we recall no case where a new trial has been granted for similar misconduct, when it appeared that the lower court sustained the objection of the prisoner and instructed the jury to disregard the statements of the prosecuting attorney.

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Jurors are supposed to be competent to understand and willing to obey the instructions of the court as to what they shall and shall not consider in determining their verdict and, as a rule, the withdrawal of the objectionable remarks by the prosecuting attorney, or by the court, or by a direction of the court, is deemed to have removed the prejudice and removed the error, so that a reversal cannot be had therefor. 46 L. R. A. 648.

Though improper language of counsel for the prosecution in argument, or otherwise, in a criminal case, has been objected to and ruled upon adversely to the defendant, and though an exception has been taken to the language withdrawn, it is not necessarily a ground for reversal. The conduct of the trial being a matter resting in the sound discretion of the trial court, that discretion will not be interfered with, except in a case of manifest abuse, prejudicial to the accused. *Inman* v. *State*, 72 Ga. 269; *Combs* v. *State*, 75 Ind. 221; *Ford* v. *State*, 34 Ark. 649; *People* v. *Van Zile*, 73 Hun. 534, 26 N. Y. Supp. 390; *State* v. *Surles*, 117 N. C. 720.

Every person accused of crime, whether guilty or innocent, is entitled to have all his legal rights protected during his trial. And in a criminal case, the Commonwealth's attorney, as the representative of the people, should guard against any violation of his rights in this respect. But if every improper remark of counsel were ground for reversal comparatively few verdicts would stand, since the most eminent counsel are sometimes led into such inadvertences. Appellate courts, therefore, hesitate to interfere by granting a new trial, except where the prosecuting attorney has so clearly departed from the line of legitimate procedure that any reasonable person will conclude that the jury were certainly prejudiced thereby.

In the instant case, it is clear that some of the remarks and questions of the attorney for the Commonwealth were improper and calculated to prejudice the accused in the esti-

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mation of the jury; but it appearing, in nearly every instance, that the objectionable remarks were withdrawn by him, or by direction of the court, we cannot hold that such conduct on the part of the attorney for the Commonwealth, under the evidence, constitutes reversible error.

The judgment complained of will be affirmed.

Affirmed.

HAYNES CHEMICAL CORPORATION v. STAPLES & STAPLES, INC.

(*Wytheville, June 15, 1922.*)

1. CONTRACTS.—Advertising Campaign—Competitive Plans — Payment of Cost in Event of Nonacceptance—Instructions—Implied Contract—Subsequent Express Promise—Consideration.
2. PRINCIPAL AND AGENT.—Authority of Agent—Ratification and Acquiescence.

Error to Law and Equity Court of city of Richmond.

Affirmed.

Williams & Mullen and *Guy B. Hazelgrove,* for the plaintiff in error.

R. Grayson Dashiell, for the defendant in error.

WEST, J.:

The defendant in error, Staples & Staples, Inc., hereinafter called the plaintiff, recovered a judgment against the plaintiff in error, Haynes Chemical Corporation, hereinafter called the defendant, in the Law and Equity Court of the city of Richmond for the sum of $707.09, with interest from February 28, 1921, till paid. The case is here upon a writ of error to that judgment.

The plaintiff and defendant are both corporations duly chartered under the laws of the State of Virginia.

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The defendant is engaged in the manufacture and sale of an insecticide product known as "Preventol."

The plaintiffs are engaged in the advertising business styling themselves "Advertising Counsellors," who are in a sense advisors to the manufacturers of the country as to how to market their products, there being over one hundred of these advertising agencies in this country. A manufacturer desiring to put a product upon the market, selects an agent and directs him to map out plans for marketing his product. The agent's remuneration for handling the advertising campaign usually consists of a commission of fifteen per cent on the space which the manufacturer buys and is paid by the publishers. The cost of drawings, displays and matters of that kind is invariably paid for by the manufacturer of the goods.

In August, 1919, C. P. Hasbrook, treasurer and a director of the defendant corporation, had an interview with H. L. Staples, president, and J. W. Faucett, vice-president of the plaintiff corporation, and commissioned them to prepare an advertising plan for the defendant, showing them how to put "Preventol" on the market, promising them their plans would receive the heartiest consideration on the part of his people, and, if satisfactory, the advertising under such plan would go to them. The plaintiff does not submit plans in competition, and no notice of competition was given it until its plans had been perfected and submitted.

Acting under instructions of Director Hasbrook, the plaintiff proceeded to make the plans without expectation of payment therefor, if satisfactory, as in that event the plaintiff would be selected to handle the campaign and make his commission out of the publishers; and if unsatisfactory it would be entitled to nothing—provided, in either event a decision in good faith was made on the merits of the plan Later on, Hasbrook requested the plaintiff to speed up the plan, and on October 12, 1919, Staples and Faucett pre-

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sented the plan to C. P. Hasbrook, treasurer and director; L. G. Larus, director, and Roger Topp, vice-president and general manager of the defendant corporation, all three of whom expressed themselves as satisfied with the campaign plan in all respects.

Hasbrook and Larus left the room, stating that Topp, as general manager, was the man to sell, and would have the last say; and at their suggestion the plans were left at defendant's office for their study. Later, Hasbrook attended a meeting of the board of directors of his company in New York, taking with him the proxy of Larus. Having no notice of the meeting, no representative of the plaintiff was present to explain the plan, nor was the plan itself, the sketches, statistics, merchandise data, or results of trade investigations there. At the close of the meeting, Hasbrook telegraphed Topp: "Our president deems it necessary to have a New York agent. Advise Staples."

The plaintiff, on condition of a fair decision on its merits, had spent a large sum of money to produce a satisfactory plan, and there is nothing in the telegram to indicate that the plan was not satisfactory. Later, Topp said to Staples and Fawcett, in discussing what happened at the New York meeting: "It looks like you got the rough end of the poker; however, you did a good job; your work was fine, and we feel you ought to be recompensed, and we would like for you to send us a bill for your expenses."

The bill was sent, but not paid, and this suit was brought to collect it.

The defendant's assignments of error are to the action of the court:

1. In refusing certain instructions asked for by the defendant.

2. In granting certain instructions.

3. In overruling defendant's motion to set aside the verdict of the jury.

4. In entering judgment upon the verdict.

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The instructions granted by the court were as follows:

Instruction No. 1.—"The court instructs the jury that if they believe from all the evidence that the defendant requested the plaintiff to devise and submit a plan of advertising to them, and it was known to the defendant that the costs and expenses were connected with the work to be done by the plaintiff, and no express agreement was made between the parties with reference to payment for the services of the plaintiff, then the jury may infer from the evidence an implied contract on the part of the defendant to reimburse the plaintiff for such expenses in connection with getting up the advertising plan as were reasonably within the contemplation of the parties."

Instruction No. 2.—"The court instructs the jury that if they believe from the evidence that the plaintiff performed certain work at the instance and request of the defendant, and thereafter the defendant acknowledged liability to the plaintiff for the expenses incident thereto and promised to pay the same, they shall find for the plaintiff in whatever amount they deem reasonable under all the circumstances of the case for such expenses."

Instruction No. 3.—"The court instructs the jury that if they believe from the evidence that the defendant did no more than to agree that the plaintiff should devise and submit to it for its acceptance a plan for an advertising campaign, then the defendant is not liable to the plaintiff for any expenses incurred in and about getting up the plan to submit to the defendant."

Instruction No. 4.—"The court instructs the jury that if they believe from the evidence that it was understood between the parties the plaintiff was merely to offer plans or specifications or a plan for advertising the product of the defendant for sale, and whether such specifications or plan were offered in competition with others or not, then the defendant is not liable for the expense of getting up such a plan unless accepted by it."

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Instruction No. 5.—"The court instructs the jury that where one party requests of another an opportunity of submitting an offer, then unless it be in the minds of both parties and understood and agreed at that time that the party making the offer is to be reimbursed for his expenses in submitting the same, then the law does not raise an implied contract for such reimbursement unless the jury shall further believe that there is a custom and usage equally within the knowledge of both parties and with reference to which they can be necessarily presumed to have contracted, calling for such reimbursement."

Instructions numbered 1 and 2 were given by the court at the request of the plaintiff; instruction numbered 3 was given by the court of its own motion, after refusing instructions offered by the defendant; instruction numbered 4 was given by the court in lieu of Instruction "B," as requested by the defendant; and instruction numbered 5 was given at the request of the defendant.

Where one renders service for another at the latter's request, the law, in the absence of an express agreement, implies a promise to pay what those services are reasonably worth, unless it can be inferred from the circumstances that those services were to be rendered without compensation. *Briggs* v. *Barrett*, 108 Va. 404.

It plainly appears from the evidence that the primary consideration which moved the plaintiff to prepare the advertising plan was the assurance of the representative of the defendant corporation that his people would give the plan heartiest consideration; which meant nothing less than a full and fair consideration of the plans and specifications upon their merits, by the proper authorities of that corporation. The record shows that the board of directors which, according to the present contention of the defendant, was alone authorized to pass upon them, never gave the plaintiff an opportunity to present its plans, and, without seeing them, and without regard to their merits, gave the

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contract to another agency, because the president of the company felt they should have a New York agent. In view of such conduct on the part of the defendant, it cannot be "inferred from the circumstances" that the services of the plaintiff, so far as concerns the expenses incurred by it were to be rendered without compensation, and we are of opinion that the law implies a promise to pay any reasonable amounts expended by the plaintiff in complying with the request of the defendant to prepare the plans.

A person cannot request another to pay out money, or perform services for him, upon his agreement to render certain services for that person, and then, after the money is paid, or the services performed, refuse to keep his agreement and escape liability for the amount of money or labor so expended at his request.

It is said by the Supreme Court of Massachusetts in *Williams* v. *Bemiss*, 108 Mass., p. 92: "* * * the defendant having refused to perform the contract, the party paying the money or rendering the service in pursuance thereof may treat it as a nullity and recover the money or value of the services under the common counts." Citing *King* v. *Brown*, 2 Hill. 485, 487, per Nelson, C. J.

There is evidence that the vice-president and general manager of the defendant corporation after the contract was awarded the New York agent, said to the vice-president of the plaintiff company that they had considered the matter and felt that the plaintiff should be compensated and asked him to send bill for expenses.

The defendant contends that a subsequent express promise does not create any new cause of action, and is without consideration, except in those cases where the circumstances are such that an implied promise to pay arises under the law; and relies with confidence or a line of cases, of which the following is representative:

Stout v. *Humphrey* (N. J.), 55 Atl. 281, where it is said:

"An express promise, therefore, as it should seem, can

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only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision.

"In the case of *Beaumont* v. *Reevs,* 8 Q. B. 483, the rule is thus stated, and it is quoted by Mr. Chitty in the text of his work on contracts (vol. 1, p. 54) 'that an express promise cannot be supported by a consideration from which the law would not imply a promise, except where the express promise does away with a legal suspension or bar of a right of action which, but for such suspension or bar would be valid.' "

In our view, there is nothing in this line of cases which should deprive the plaintiff of its right to a recovery, as there *was* an implied promise to pay the amount expended at the defendant's request.

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The defendant questions the authority of Hasbrook tc bind the corporation by a contract of this nature.

It appears from the evidence that Hasbrook was treasurer and director; Larus, director, and Roger Topp, vice-president and general manager of the defendant corporation, all of whom resided in Richmond, and that they constituted three of the five stockholders of the corporation, the remaining two, including the president, being residents of New York.

The general manager had full authority and was in active charge of the business of the company and was made vice-president to increase his authority.

Hasbrook requested the work to be done, and promised that the plans would have the heartiest consideration of his people, and that if approved, the defendant would be given the contract.

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The plans were in preparation for several months, during which time it is presumed that he informed the proper officials of his company as to the agreement he had made with the defendant, as he sent defendants a request to speed up the plans. When completed, the plans and specifications were submitted to these three gentlemen, all of whom received and inspected them, without any suggestion from the vice-president that Hasbrook had exceeded his authority in the premises. All three declared the plans satisfactory. Hasbrook and Larus, upon leaving, informed Staples that Topp, vice-president and general manager, was the man they would have to sell, that he would have the last say There is nothing in the record to show that any member of the board of directors at the New York meeting questioned Hasbrook's authority. On the contrary, his telegram intimates that the board had no objection to the plans, but the president felt the contract ought to go to a New York agent.

In *Winston* v. *Gordon,* 115 Va. 899, 8 Va. App. 579, this court held:

"An act of an agent from which he derives no personal benefit, but which is done in good faith for the benefit of his principal, and which was apparently necessary and would redound to his benefit, will be held to have been ratified and acquiesced in, and thereby rendered valid upon slight evidence." And it is said "this doctrine is as applicable to corporations as to other principles."

The contract under consideration, entered into by one director, was within the charter powers of the corporation and was made, the circumstances tend to show, with the knowledge and consent of the vice-president and general manager and another director of the company.

In *Am. B. H. O. S. Mach. Co.* v. *Burlock,* 35 W. Va. 647 661, the court said:

"There are so-called corporations which, for all practical purposes, when they do business, cannot be reached at all if we are not permitted to treat the only known or ac-

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cessible embodiment in any other way than according to the character the manager may see fit for the occasion to assume. He is possessed of full authority to talk and act when there is anything to be gained, but he is not the proper man to talk or act when there is anything to be lost; and yet the principal, for all practical purposes, if not often in reality, is represented in no other way except by a name so that a species of legerdemain is carried on—'now you see it, and now you don't.' The ordinary business world is becoming tired with, if not vexed at, this sort of jugglery and thinks that the true principles of evidence and of agency are not so narrow or so rigid that they may not be made to reach such cases."

Admitting that the making of the contract was irregular in its inception, those who governed the corporation will be held, by their conduct, to have waived such irregularity and the corporation is estopped to rely on it as a defense to this action.

We find no error in the instructions granted of which the defendant can complain; and are of the opinion that the jury were fully and fairly instructed, and that there is no error in the court's refusal to grant instructions.

Upon the record, we are unable to say that the verdict of the jury is plainly wrong, or without evidence to support it.

For the foregoing reasons, the judgment complained of will be affirmed.

Affirmed.

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HIBBS, ET AL., *v.* FIRST NATIONAL BANK OF ALEXANDRIA, VA., ET AL.

(*Wytheville, June 15, 1922.*)

1. ACTIONS.—Recovery of Money Paid by Mistake of Fact—Negligence of Payer-Plaintiff.
2. IDEM.—Recovery of Money Paid by Mistake of Fact—Change of Position of Defendant—Application of Money—Accord and Satisfaction—Code, sec. 5765.

Error to Circuit Court of city of Alexandria.

Affirmed.

C. E. Nicol, for the plaintiffs in error.

Jas. R. Caton and *Gardner L. Boothe,* for the defendants in error.

This is an action of trespass on the case in assumpsit, brought by the plaintiffs in error (who will be hereinafter designated the plaintiffs), against the defendants in error (who will be hereinafter designated as the defendants, or as the bank and Duffey, respectively), to recover back the sum of $1,609.80 paid by the plaintiffs to the bank under a mistake of fact discovered after the money was so paid and of which the bank and Duffy had no notice until after the bank had placed the money to the credit of the checking account of Duffey, and the latter had so acted, as he claims, as to have changed his *status quo ante* to his detriment and injury, if the recovery or any part thereof sought against him were allowed.

There was a verdict and judgment in favor of both of the defendants, and the plaintiffs allege error.

The transaction and the material circumstances under which the money was paid to defendant bank by the plaintiffs; under what mistake the money was paid, and the circumstances under which the bank refused to refund the money to the plaintiffs, as shown by the evidence without

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conflict therein, in so far as the bank and the plaintiffs are concerned, were as follows:

On December 5, 1919, the bank sent to the plaintiffs a certificate of 100 shares of "Ventura Oil Development Company" stock, together with an order in writing instructing the plaintiffs, who were brokers engaged in the business of buying and selling stocks, etc., for customers, to sell this stock. The plaintiffs were not informed whether the bank was the owner of the stock or was merely acting for some one else who was the owner; but the testimony, both for plaintiffs and the bank, was to the effect that, in accordance with the usual course of business, the plaintiffs, in all such cases, in the absence of notice to the contrary, assumed and acted upon the assumption that the bank was not the owner of the stock, but was having it sold for some client of the bank who was the owner of it. Thereupon, on the same day—December 5th—the plaintiffs wired their New York correspondent to sell 100 shares of Ventura Oil Development Company stock at the market price. The New York correspondent failed to find any market for the stock in New York City or in several other markets, other than Boston, after several days of efforts to make the sale, and thereupon wired the plaintiffs, informing them of such result. The plaintiffs, in turn, thereupon, on December 8th, wrote the bank, referring to its "order for the sale of 100 shares of Ventura Development Company," stating that they had "tried practically every market, but had been unable to obtain any quotation on the stock," and said that they held the stock awaiting further instructions from the bank. The bank promptly replied by letter addressed to the plaintiffs, the contents of which were as follows: "We have yours of 8th inst., stating that you have been unable to find a market for the 100 Ventura Development Company stock, sent you a few days ago by us for sale. We were under the impression that this was dealt in in Boston. If we are mistaken, however, will you kindly return the cer-

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tificate to us * * *." Thereupon, the plaintiffs, on December 11th, wired their New York correspondent aforesaid to transfer the order for the sale of the 100 Ventura Oil Development Company stock to a correspondent of the plaintiff's in Boston. The New York correspondent of the plaintiffs thereupon wired the Boston correspondent of the plaintiffs over their private wire to sell "100 Ventura Oil Development," as a member of that firm testified, for the account of the plaintiffs. But, as a member of the firm which was the Boston correspondent aforesaid, testified, the message, as received by the Boston correspondent, read as follows: "Sell 100 Ventura" for account of plaintiffs. Mr. Spaid, one of the plaintiffs, testified that this mistake was made either by the sending or receiving operator of the wire—the employee of their correspondent in New York, or of their correspondent in Boston—who handled this message; that "the mistake was between the two operators. We do not know which one." On receipt of this message, the Boston correspondent of the plaintiffs, on December 11th, sold on the Boston market "100 shares of Ventura Consolidated Oil Fields" stock at sixteen and one-half, which was the stock of a wholly different corporation from that of "Ventura Oil Development Company"; the stock which was sold being, however, commonly known and dealt in on the Boston market as "ventura." On making such sale, the Boston correspondent wired the plaintiffs that they had sold "100 Ventura," at sixteen and one-half, for their account. On receipt of this advice the plaintiffs on the same day—December 11th—wrote the bank as follows: "We beg to advise you we have this day for your account and risk sold 100 Ventura Oil Development Company, price sixteen and one-half, commission 15.00, taxes .20—credit 1,609.80." On December 12th the plaintiffs mailed a check to the bank for such net proceeds of sale, to-wit, for $1,609.80. This remittance was received by the bank on December 13th. The bank thereupon phoned to Capt. Duffey, for whom the bank

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had been acting in making the sale of the stock, that the bank was crediting his account with the $1,609.80, the net proceeds of the sale; and, accordingly, the bank that day placed that sum to the credit of the checking account of Duffey with the bank.

Meanwhile, on receipt by the plaintiffs of the aforesaid advice from their Boston correspondent of the sale aforesaid, the plaintiffs forwarded to such correspondent the aforesaid certificate of stock. It arrived in Boston on December 18th. Whereupon, the Boston correspondent of the plaintiffs discovered the mistake that had been made, which had resulted in their selling of a wholly different stock from that which the plaintiffs had intended for them to sell. Thereupon, the Boston correspondent wired the plaintiffs, informing them of the mistake, and later in the day the plaintiffs received another message from their Boston correspondent, in which it was mentioned that the certificate of stock forwarded, as aforesaid, was of the "Ventura Oil Development Company, of California," and that the stock the correspondent had sold was of the "Ventura Consolidated Oil Fields, incorporated under the laws of Maine," and that the office of the latter corporation knew nothing about the stock forwarded, and that the corporation had never heard of it. Thereupon, plaintiffs, promptly, on the same day—December 18th—called the bank over the phone and informed the bank of the mistake that had occurred and wired their Boston correspondent to protect them the best they could. Thereupon, the Boston correspondent bought 100 shares of "Ventura Consolidated Oil Fields" stock at the market price, which was then sixteen, for the account of the plaintiffs; so that the loss of the plaintiffs on the actual dealing in this stock was a trifling amount, to-wit, $5.20, for which they make no demand in this action, confining their claim to the demand for the return to them of the $1,609.80 paid to the bank, as aforesaid, under the aforesaid mistake of fact.

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We come now to circumstances which are material only as bearing on the question of the liability of the defendant. Capt. Duffey, about none of which is there any conflict in the evidence, however, save one fact, which conflict in evidence will be hereinafter pointed out.

When the bank was informed, over the phone, by the plaintiffs, as aforesaid, of the mistake aforesaid, which had occurred, the cashier of the bank (with whom the conversation was being had) told the plaintiff, Spaid (who was doing the talking for plaintiffs) that the bank would get in touch with its client immediately. Thereupon the cashier called Capt. Duffey, the client referred to, over the phone. and the latter came promptly to the bank, was told of the mistake which had occurred, and the cashier also told him that he had better go right over and see the plaintiffs and try and adjust the matter. Accordingly, Capt. Duffey immediately went over to Washington city to the place of business of the plaintiffs, and had an interview with the plaintiff, Mr. Spaid, which the testimony of Duffey describes as not at all satisfactory. Duffey's testimony on the subject of what transpired at this interview is to the following effect: That Duffey told Spaid who he was, the reason he had called about the stock transaction, and explained his own (Duffey's) situation and the bank's situation; that he explained the circumstances (which will be hereinafter more particularly referred to), attending his getting the bank to sell the stock, by reason of which a Mr. Sprague (as will be hereinafter set forth more at length), had an interest in the money derived from the sale of the stock; that he told Spaid that he (Duffey) had disbursed the money which the bank had placed to his credit as derived from the sale of the stock before the bank notified him of the aforesaid mistake, or at least had given other people checks on it including a check to Sprague for his share of it. That while he (Duffey) was talking, Spaid paid but little attention to him, walking away to talk with his stenographer at one

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time, and engaging in a conversation at another time, with some young man who came into the office; that Spaid told Duffey that the plaintiffs were looking to the bank, and, in effect, that plaintiffs did not recognize or look to him (Duffey), in any way whatsoever; and that Spaid evidenced by his manner that he was considerably bored by the interview and looked upon Duffey as an unwelcome intruder, and that the plaintiffs were indifferent as to what Duffey might do or leave undone about the matter; that he (Duffey) did not promise to let Spaid hear anything further from him about the matter; and that Spaid, by his attitude and what he said, clearly indicated that he did not care or expect to hear anything further from Duffey. That, in one of the intervals when Spaid was giving his attention to something else, he (Duffey) phoned to the bank and stopped the payment of the check which he had given Sprague (which will also be hereinafter more particularly mentioned).

Just here is the only conflict of evidence in the case which is of any importance. Spaid's testimony is to the effect that after Duffey had phoned to the bank stopping payment of the check given Sprague, Duffey said, as the last thing before he left, that he would go and talk the matter over with the cashier of the bank and "let me know," or "let us know," as the witness expresses it at different times in his testimony. The witness does not explain just what Duffey said he would let the plaintiffs "know," nor just what the witness expected in this particular.

The uncontroverted fact is that Duffey did not have any further communication with the plaintiffs before this action was brought.

The other circumstances bearing on the question of the liability of the defendant Duffey, about which, however, there is no conflict in the evidence, may be stated as follows:

Prior to his going abroad in service in the recent world-war, Capt. Duffey, being a lawyer, had been counsel for and had represented a Mr. Sprague, who was president of an

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industrial corporation of Washington City, and Sprague was considerably in Capt. Duffey's debt for professional services rendered the former by the latter. Capt. Duffey was discharged from service in September, 1919, and came home. Shortly after Capt. Duffey's return from abroad Sprague came to his office and wanted him to do some professional work. Duffey declined to represent Sprague any further until he had made some arrangements to satisfy the aforesaid indebtedness, which amounted to between eight hundred and a thousand dollars, as Capt. Duffey testified. Thereupon Sprague placed the aforesaid Ventura Oil Development Company certificate of stock in Duffey's hands to sell with the mutual understanding and agreement between them that in the event of sale Duffey was to receive half of the proceeds of sale, in satisfaction in full of the aforesaid indebtedness, and Sprague was to receive the other half. That thereafter Duffey rendered other professional services for Sprague for which the latter paid Duffey.

That, the same afternoon on which the stock was thus placed in his hands, Duffey placed the stock in the hands of the bank for sale.

Accordingly, when the bank notified Duffey on December 13th, that the stock had been sold and that his account was being credited by the $1609.80 proceeds of sale, he, on the same day, wrote Sprague, giving Sprague an acquittance in full of said indebtedness, and inclosing to him a check on the bank for $804.90, Sprague's one-half of said proceeds of sale; and also drew and sent out to other persons checks on the bank, of what precise amount in the aggregate the evidence does not disclose.

When payment of the Sprague check was stopped, as aforesaid, Sprague was notified and came the next day to see Duffey, who explained the circumstances to Sprague and declined to pay the latter the $804.90, unless compelled to do so by law. Sprague thereafter on December 31st, 1919, instituted action on the check against Duffey, (mak-

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ing the bank also a party to the proceeding), to recover the amount of said check, to-wit, the said $804.90, with interest from December 13, 1919. In such action Duffey made no affidavit putting the plaintiff, Sprague, to proof of his claim, but on the hearing, Duffey, appeared and stated the facts to the court, whereupon judgment was entered, on January 12, 1920, in favor of Sprague against Duffey, for the sum sued for and interest as aforesaid, and Duffey, on January 13, 1920, paid the amount of the judgment to Sprague's attorney.

Meanwhile, as the plaintiff, Spaid, testified, he was informed by another person, shortly after the Duffey interview aforesaid, of December 18th, that Duffey's check to Sprague had been returned to Sprague unpaid; that about two weeks after December 18th, witness was thinking about the matter and called up the cashier of the defendant bank or some other officer of the bank, on the phone, and asked what had been done about it, and was told that "some suit had been brought about the matter," and that thereupon the plaintiffs placed the case in the hands of their attorneys.

It further appeared in evidence that the plaintiffs did not institute any proceeding seeking to attach the portion of money in the hands of Duffey covered by the Sprague check before Sprague recovered the judgment and Duffey paid him the $804.90, as aforesaid; also that the plaintiffs have never made any demand upon Sprague for such portion of the money; and also that the bank did not institute any interpleader proceeding following the notice given it by the plaintiffs of the mistake aforesaid, but took and relied upon the position that it had parted with the control of the money before receiving such notice.

It also appeared in evidence that, including the said deposit to his credit of the $1609.80, Duffey's credit balance on his checking account with the bank was $1824.40 on December 13th. That the 14th was Sunday, on which the same balance was carried over. That this balance on the

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15th was $1773.40; on the 16th to 18th, inclusive, $1696.50, and on the 19th $1609.45.

It also appeared, in evidence, that upon further negotiation by the plaintiffs, it was ascertained that the stock which the bank sent to the plaintiffs for sale was in fact worthless at the time; but that neither the bank nor Duffey knew this until that fact was ascertained by the plaintiffs; and that the stock was placed with the bank by Duffey and by the bank with the plaintiffs, for sale, in good faith.

The plaintiffs mailed the stock to the bank in April, 1920, whereupon the bank promptly returned it to the plaintiffs, who in July, 1920, instituted this action.

Sims, J., after making the foregoing statement, delivered the following opinion of the court.

The questions raised by the assignments of error will be dealt with in their order as stated below.

1. Were the plaintiffs, under the circumstances, entitled to recover from the bank the money paid to it under the mistake of fact above set forth?

The question must be answered in the negative.

The principle upon which a right of recovery is based, in the case of money paid by mistake of fact, is well settled. The right of recovery, where it exists, is based upon the promise to return the money which the law implies, irrespective of any actual promise, and even against the refusal to make it, whenever the circumstances are such that *ex aequo et bono* the money should be paid back, but in such case only. *Norfolk* v. *Norfolk County*, 120 Va. 356, 13 Va. App. 324; *Lawson* v. *Lawson*, 16 Gratt. (57 Va.) 230; *Rinehart* v. *Pirkey*, 126 Va. 346, 19 Va. App. 363, 101 S. E. 353; 2 R. C. L. sec. 38, pp. 784-5, sec. 8, pp. 749-750; 6 Idem. sec. 7, pp. 588-9; *Moses* v. *Macfarlen*, 2 Burrow, 1012; 3 Pomeroy's Eq. Jur. (3rd ed.), sec. 1238; *Bond* v. *Hoyt*, 13 Pet. 263, 10 L. Ed. 154. Accordingly, it is well settled that money paid under a mistake of fact cannot be recovered back where the payment has caused such a change

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in the position of the payee that it would be unjust to require him to refund. 21 R. C. L., sec. 201, p. 170; 2 Elliott on Contracts, sec. 1390; *Grand Lodge etc.* v. *Towne* (Minn.) L. R. A. 1917E, 344, and note pp. 353 et seq.; *Walker* v. *Conant,* 65 Mich. 194.

As said in 21 R. C. L., sec. 201, p. 170: "The rule that money paid under a mistake of fact may be recovered back does not apply where the payment has caused such a change in the position of the other party that it would be unjust to require him to refund."—Citing numerous American and English cases. To the same effect is section 1390 of Elliott on Contracts.

In *Grand Lodge etc.* v. *Towne, supra,* this is held: "In an action to recover for money had and received under a mutual mistake, defendant is not liable where he has irrevocably altered his position to his loss in reliance upon the payment."

In the instant case the defendant bank was entirely without fault in bringing about the mistake. The mistake was made by an employee of either one or the other of two agents of the plaintiffs, for whose selection the bank was in no way responsible, and it must therefore be regarded as a mistake wholly made by the plaintiffs, in so far as this action is concerned. The bank, upon receipt of the payment and in reliance thereon, before it had any notice of the mistake, placed the money to the credit of the checking account of Duffey with the bank, and so notified the latter. Thereupon the relationship between the bank and Duffey was changed, from that in which the bank was a mere agent for Duffey to sell and collect the proceeds of the stock, into that of general depositor on the part of Duffey and debtor on the part of the bank, from which resulted the unconditional right of Duffey to check upon the deposit. 3 Am. & Eng. Enc. of Law, (2nd ed.), 826, citing numerous cases and among them *Robinson* v. *Gardner,* 18 Gratt. (59 Va.) 509. Such being the case, the bank had no right to thereafter

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charge back the amount of the deposit against the account of Duffey without his consent, upon any happening whatsoever. It had become the unconditional debtor of Duffey to the amount of the deposit. It could not thereafter impose any condition upon that relationship. It was just as if Duffey had deposited the money in the bank derived from some source with which the bank had no connection. It was not the case of a deposit of commercial paper made and received as a deposit under a special arrangement, express, or implied from the usual course of dealing between the depositor and the bank, or otherwise, by which the depositor had merely a conditional right to check upon the amount of the deposit, subject to the right of the bank subsequently to charge back to the account the amount of the deposit, should the bank fail to realize upon the paper. See cases of that character referred to in *Bank* v. *Bragg*, 127 Va. 47, 20 Va. App. 67.

There are many cases and authorities which deal with the effect of the negligence of the payor plaintiff, (by reason of which the mistake is occasioned), upon the right of recovery back of money paid under a mistake of fact, where the payee defendant is free from fault, or is less in fault than the payor; but as there is present in the case in judgment the element of the change of *status quo ante* aforsaid, which, certainly where the payee is wholly without fault, of itself renders it unjust that he should be required to refund to the payor, we have not entered upon any specific consideration of the cases and authorities concerning the comparative degrees of the negligence of the plaintiff and the defendant or the effect of the negligence in such cases.

It is argued in behalf of the plaintiffs that the bank, upon receiving notice that payment had been made under the mistake of fact aforesaid, at the least owed to the plaintiffs the duty of instituting an interpleader proceeding, convening the plaintiffs, Duffey and Sprague, before the court, and thus having the rights of all parties determined while the money

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was yet in the hands of the bank. The answer to this however, is obvious. The bank would have owed such duty only had it had control of the money at the time it received such notice. As we have seen, it then no longer had such control. It had prior to that time become the debtor of Duffey for the money, and as much so as if Duffey had obtained it from some source with which the bank had no connection and of which it had had no information.

2. Were the plaintiffs, under the circumstances, as the jury were warranted in finding, and as, therefore, we must find them, entitled to recover from Duffey the money which, in effect, came into his hands as a result of the payment of it to his agent, the bank, by the plaintiffs, under the mistake of fact aforesaid, or any part thereof?

This question must also be answered in the negative.

The principle and the considerations affecting the right of the plaintiffs to recover of Duffey are, manifestly, in general the same as those above considered as affecting the right of recovery of the bank; and there was the same entire absence of fault on the part of Duffey, as there was on the part of the bank, in bringing about the mistake; and also an absence of all responsibility for the employment of those, one or the other of whom made the mistake; so that the mistake, in so far as Duffey is concerned also, must be regarded as a mistake wholly made by the plaintiffs. Further: And since in the case of Duffey also, we find the presence, as claimed, of the element of change of *status quo ante*, which, if true, must have the same effect upon his liability as upon that of the bank, we shall, upon the question now before us, confine ourselves to the consideration of whether there was sufficient evidence before the jury to warrant their finding that there was such change of *status*, and, if so, whether there was evidence before the jury from which they could properly reach the conclusion that Duffey, in equity and good conscience, did nothing which forfeited his right to rely upon such change of position.

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That Duffey, on receipt of information from the bank, on December 13th, that the money was paid to the bank and had been deposited to his credit, (which was three days before he had any notice of the mistake aforesaid), drew and sent his check upon the bank to Sprague for one half of the money in question, which belonged to Sprague, was shown by the evidence without controversy. This was a change of position on the part of Duffey, caused by the payment to the bank, which, certainly in view of the subsequent actual enforced payment of the money by Duffey to Sprague under the judgment therefor obtained by the latter, plainly made it unjust that he should be required to refund that portion of the money to the plaintiffs; unless it appears from the evidence that Duffey, by his conduct, caused the plaintiffs to lose some remedy of theirs against Sprague, or the bank. As bearing on this single point, there is conflict in the evidence as to the conduct of Duffey in one particular. The testimony for the plaintiffs is to the effect that after Duffey had phoned to the bank, stopping the payment of the check to Sprague, Duffey stated to one of the plaintiffs that he (Duffey) would have a talk with the cashier of the bank and let the plaintiffs "know" something further about the matter,—just what he was to let the plaintiffs "know" is not disclosed by the evidence. Duffey, in his testimony denied that he made any such promise. Now, in the first place, that conflict in the evidence presented a question of credibility of the witnesses, which the verdict concluded in favor of Duffey. Secondly: There is no evidence for the plaintiffs showing that they relied upon such a promise on the part of Duffey to their detriment in any way. Certainly the plaintiffs did not lose any remedy against the bank, or Sprague, by reason of reliance upon such a promise, because one of the plaintiffs, Mr. Spaid, testified that about two weeks after he claimed that this promise was made, he inquired of the bank, what further had been done about the matter, and was given actual or constructive notice from

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the bank of how the matter then stood,—at which time the matter stood precisely as it did at the time the alleged promise aforesaid was claimed to have been made by Duffey, in so far as the remedies of the plaintiffs are concerned. That is to say, at both of such times the position of the bank was such there was no liability upon it, and Duffey had not paid any money to Sprague. And, as appears from Mr. Spaid's testimony, the plaintiffs did not, after such notice from the bank rely upon any alleged promise of Duffey, but immediately placed the matter in the hands of their attorneys. The plaintiffs had every remedy, at the latter time, against the bank, against Sprague, and against Duffey, that they had at the time of the alleged promise on the part of Duffey to inform the plaintiffs further about the matter. And so far as losing any remedy against Sprague is concerned, the plaintiffs, as the evidence showed, never even made any demand upon Sprague for any part of the money.

The sole remaining enquiry is, whether the application by Duffey, of the other half of the money in question, to the satisfaction of Sprague's indebtedness to him, and his acquittance of Sprague of such indebtedness, in pursuance of their prior mutual understanding and agreement to that effect, (which application and acquittance occurred upon Duffey's receipt of notice from the bank that the payment of the money into bank had been made, as aforesaid), constituted such a change of position on the part of Duffey, with respect to such half of the money, that it would, in equity and good conscience be unjust to require Duffey to refund such money to the plaintiffs? This was unquestionably so, if by such application and acquittance, Duffey released Sprague from the obligation of his indebtedness aforesaid, and if such obligation, if it had not been released, would have been worth anything, however little, to Duffey. Now it is elementary that this transaction did release Sprague from such obligation, if it amounted to an accord and satisfaction; and, in view of the evidence in the case show-

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ing the position Sprague occupied in business some two years before and that Duffey had recently rendered professional services for him for which Sprague had paid the fees, the jury were warranted in finding, and, hence, we must find, that the obligation of said indebtedness would have been worth something to Duffey, if it had not been released. Our concluding enquiry is, therefore, reduced to this question: Did the transaction under consideration amount to an accord and satisfaction in contemplation of law? We think that it did.

As disclosed by the evidence it would seem that, more probably, the claim of Duffey against Sprague, was not a definitely ascertained amount,—was not evidenced by an obligation for a definite sum,—but was merely the reasonable value of certain professional services rendered by Duffey at the instance and request of Sprague; that is to say, it was an unliquidated demand. If that was so, the agreement between Sprague and Duffey, fixing its amount, as between eight hundred and a thousand dollars, constituted an accord. And, in such case, the application by Duffey of the one-half of the money in question to the satisfaction in full of the indebtedness and his complete acquittance of Sprague from the obligation thereof, in pursuance of the prior agreement authorizing him so to do, while that agreement still existed, executed the accord; so that, at common law, the accord and satisfaction became complete. But even if the indebtedness was a liquidated demand, the aforesaid application of the money was an express acceptance thereof by the creditor in full satisfaction of the debt, in pursuance of the agreement aforesaid; so that, under the statute, (Code sec. 5765), the same result followed. The accord and satisfaction having thus become complete, it could not have been rescinded by Duffey alone, without the consent of Sprague. It, therefore, extinguished and operated as a final bar to the obligation of said indebtedness, either at common law, (R. C.

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L., Article "Accord and Satisfaction," sections 1, 30, 35, 38), or under the statute, (Code, sec. 5765).

The case will be affirmed.

Affirmed.

HILL, ET AL. v. BELL, ET AL.

(*Wytheville, June 15, 1922.*)

1. BOUNDARIES.—Title by Adverse Possession—Surveys—Evidence—Form of Verdict—Amendment—Disclaimer.

Error to circuit court of Campbell county.

Remanded.

Jas. H. Guthrie, for the plaintiffs in error.

Robert A. Russell and *Wm. M. Murrell,* for the defendants in error.

BURKS, J.:

This is a proceeding under section 5490 of the Code to ascertain the true boundary line between the lands of the plaintiff and the defendants. There was a verdict and judgment for the plaintiff, and the defendants assign error.

The plaintiff (Bell) claimed in his notice that the true boundary line was as follows: "Beginning at a point on Seneca creek, just below the mouth of Pheasant branch, thence in a southerly and southwesterly direction along an old fence row to a point on the Marysville and Long Island road near the Island Gate." The plaintiff claimed title both by his title papers and by adverse possession for the statutory period. The defendants, following the provisions of the statute, filed no plea, but filed a statement of their grounds of defense in writing. These grounds were, (1)

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that the old fence row was not the line between the plaintiff and the defendant; (2) that the plaintiff has not had adverse possession for the statutory period, or any legal possession, but on the contrary the defendants have had such possession; and (3) that the true line is that shown by the survey of the land made by Rufus A. Murrell about the year 1875, and that defendants and those under whom they claim have had adverse possession for a long time prior to that time, "and since then to the present time." Upon these pleadings the parties went to trial; the statute providing that the parties should be deemed to be at issue upon filing the grounds of defense, and without any replication.

In vacation, and before the issue was made up, the judge of the trial court, on the motion of the petitioner, directed the county surveyor of Campbell county, to "make such surveys in this boundary controversy as he may deem necessary, and within reasonable limits, such as may be required by any party in interest; that said survey be made after reasonable written notice to the above mentioned parties both petitioner and defendants, and does further direct the said surveyor to report his acts hereunder to the court in this cause by filing plat and report before the September term, 1920, in the clerk's office of this court." This survey was made and reported to the court pursuant to the vacation order aforesaid.

The quantity of land in dispute is 19½ acres, which is described by the plaintiff in his testmony as follows: "Most of the land in dispute is grown up and there is no sign that any of it has ever been cultivated, except what I have cultivated, along the creek it is mostly hills and bluffs, only some very small flats." Neither party had actual possession of the land in controversy, but each claimed title to the extent of his boundary wherever that might be.

The claim of title by adverse possession failed for want of proof, as to both plaintiff and defendants. The lands of

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both parties abutted on Seneca creek, into which there flowed two branches 1179 feet apart at the creek, and it became all important to determine which of the two was known as "Pheasant branch," as that was one of the calls in the Murrell survey. Upon this subject the testimony was very conflicting, with probably the preponderance in favor of what is called the upper branch. The surveyor, therefore, could not use either as a fixed point, but had to start at some other point about which there was no dispute. Both parties accepted the Murrell survey as correct, and that is about the only question in the case upon which all parties agreed. On nearly all other questions the witnesses were far apart. This Murrell survey is also spoken of as the "Bruce Island Plat." The two are the same.

In order to get an undisputed point of beginning, the surveyor went upon another tract, and, using the Bruce Island Plat, took as his first station the point where Rocky branch flows into Seneca creek, and ran the line in accordance with that plat, thence up the meanderings of that branch to a point near its source, and thence still with the courses of said Bruce Island Plat to the Marysville road, but the distance given in said plat fell 442 feet short of said road, thence crossing the road near Island Gate and continuing the same course and distance given on said plat to a station, and thence with the course given on said plat to Seneca creek, but the distance given in the last call fell short of reaching the creek by 330 feet. Of this latter shortage, Farmer, a surveyor who testified for the defendant, says, this 330 feet is one 'out' by a two pole chain, the kind that was formerly in general use by surveyors." It will be observed that in the above survey, the county surveyor in every instance followed the course given by the Bruce Island Plat, after making proper changes for variation in the magnetic needle, but in two instances the distances fell short. The lines thus run brought the survey to an end at Seneca creek at the point where the lower branch empties

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into it. In his report to the court, the surveyor says that this survey "was made by the Bruce Island Plat under which C. Booker Bell holds title." In other words this is the line as claimed by Bell. The surveyor also ran three other lines which are shown on his plat. They are designated, respectively, "Line to which A. C. Davis has held possession before the survey," "Line called for in deed from Hill & Nicholas to A. C. Davis," and "Bruce Island Plat run from birch just below mouth of Upper Branch." A. C. Davis is the defendant in possession of the land in controversy.

The defendants offered in evidence E. R. Farmer, a surveyor from South Boston, and certain plats prepared by him to show that the "Pheasant branch" mentioned in the record was the upper branch and not the lower. But he took as his starting point the rock corner at the "Island Gate" on the Marysville road, because he says the plaintiff had told him that was his corner. He says, "Mr. Bell told me that was his corner, and I took it to be the location of the stump in the Upton line on Marysville road called for in the notes of Rufus A. Murrell's survey, but the Murrell notes don't fit to the Island Gate, and I changed the courses to agree with the distances, which is the usual method of adjusting discrepancies of that character in surveys." The plaintiff testified, "I don't know anything about a corner stump on the Marysville road. Never saw a line stump there, there is a hole in the ground near the Island Gate in which there is a rock, but I do not know that it is a stump hole, or the line or corner called for in the deeds." Farmer also assigned other reasons for thinking that the upper branch was "Pheasant branch," and there were a number of other witnesses who testified that the upper branch was "Pheasant branch."

With all this evidence before them, the jury brought in the following verdict: "We, the jury, find for the plaintiff, and agree on the survey of Fred Kabler, Sept. 10, 1920,"

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which is the survey of the county surveyor hereinbefore referred to bearing the date last mentioned.

The plaintiff objected to the verdict "as being uncertain and indefinite and not in proper form," and thereupon the court directed the jury to retire to their room and find a verdict in proper form. Whereupon one of the jurors asked the court if the jury had the right to find any other line as the true line, and the court gave to the jury the following verbal instruction: "You are not obliged to follow exactly the lines claimed by the plaintiff or the defendant, but should find such verdict and fix such line as the law and the evidence establishes as the true line." To which direction neither party excepted. Then the jury again retired to their room, and some time thereafter returned into court and rendered the following verdict, to-wit: "We, the jury, find for the plaintiff, and ascertain the true boundary line between the plaintiff C. Booker Bell and the defendants, the coterminous land owners, to be as follows: Beginning at the Island Gate, thence a straight line to 'hollow maple' on Seneca creek, as shown on the plat of Fred Kabler, filed with his report in this case."

The original verdict, though general, fixed as the true boundary line between the litigants the line marked on the Kabler survey, "Bruce Island plat run from mouth of Rocky branch." This finding was abundantly sustained by the evidence. The corrected verdict, however, giving a straight line from Island Gate to hollow maple, while sustained by the testimony of the plaintiff and one of his witnesses, is not supported by the title papers. The verdict, as corrected and accepted by the court, took away from the plaintiff a part of the land given to him by the original verdict and also gave him a small triangular shaped piece of land which the original verdict had given to the defendants. During the oral argument, counsel for the plaintiff (Bell) stated that they were willing to sustain the loss imposed by the corrected verdict, and would enter a disclaimer as to the

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small triangular piece of land lying east of the straight line fixed by the corrected verdict which was given to the defendants by the original verdict.

If the original verdict was correct as to the location of the dividing line (and we cannot say that it was not), the defendants cannot be hurt by the acceptance of the amended verdict and the disclaimer aforesaid, for in this way they get more than they would have gotten by the original verdict if it had specifically located the line found by the jury. The jury had the benefit of the testimony and drawings of the surveyors, one presenting the view of each side of the controversy, as well as the testimony of a number of witnesses, and it is not likely that any more light would be thrown on the subject by any further surveys. Their finding under these circumstances should not be disturbed if the rights of the parties will not be violated thereby. The plaintiff, as we have seen, has signified his willingness to accept the verdict and make the disclaimer aforesaid, and this action on his part will not be prejudicial to the rights of the defendants as ascertained by the first verdict. The case, therefore, will be remanded to the Circuit Court of Campbell county with direction to put the plaintiff upon terms to disclaim of record any right, title, interest, or estate, in and to so much of the land shown by the Kabler line, run from the mouth of Rocky branch, as lies east of the straight line fixed by the verdict of the jury, or else submit to a new trial. *Fry* v. *Stowers*, 98 Va. 417. If the plaintiff shall make the disclaimer, the circuit court shall cause the true boundary line as fixed by the verdict of the jury and the disclaimer aforesaid, to be clearly and distinctly marked before entering judgment, and then enter up judgment accordingly; and upon entering judgment it shall further direct such record thereof to be made as appears to be proper. If the plaintiff declines or fails to make such disclaimer, the said circuit court shall award the defendants a new trial.

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There are two minor assignments of error to rulings of the trial court on the admissibility of evidence. We are of opinion that the defendants were not prejudiced by either of them, and that they are not of sufficient general interest to warrant discussion.

The defendants in error will be awarded their costs in this court as the parties substantially prevailing.

Remanded.

HUTCHINSON v. COMMONWEALTH.

(*Wytheville, June 15, 1922.*)

1. LARCENY.—Appropriation by Finder of Stolen Bonds of Money Received from Sale—Evidence—Identification of Bonds—Conversations—Instructions—Knowledge of Theft by Finder—Dishonest Intent—Receiver of Lost Property—Code, sec. 4448.

Error to Corporation Court of city of Lynchburg.

Affirmed.

Hester & Hester, for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

WEST, J.:

The plaintiff in error, Lash Hutchinson, hereafter called the accused, was convicted by a jury in the Corporation Court of the city of Lynchburg, on an indictment charging him, Thomas Rucker (alias Thomas Ruffin), John Henry Garland, William Jones and five others with the larceny of five one thousand dollar bonds of the Third Liberty Loan issue, and given four years in the penitentiary. The trial

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court sentenced him accordingly and the case is here upon a writ of error to that judgment.

On June 25, 1921, the runner for the First National Bank of Lynchburg, went to the post-office of that city and receipted for a registered package, from the National City Bank of New York City, addressed to the First National Bank of Lynchburg, Virginia. This package was a large envelope with the name and address of the sender on the bottom, and a red seal on the back, thereof, and contained five one thousand dollar bonds of the Third Liberty Loan. on his way back to the bank the runner dropped the package on the street and shortly thereafter Thomas Ruffin, who is jointly indicted with the accused, found it by the curbing on Church Street with dirt on it, as if people had been walking on it. Ruffin claims he can neither read nor write. He took the package to the pool room and called William Jones, who is also jointly indicted with the accused, to the rear of the room and showed it to him.

John Henry Garland testified that he went to school with Thomas Ruffin and that Ruffin was "smart" and could both read and write. On the same day Ruffin cut five coupons from the bonds and turned four of the bonds over to William Jones, and got a Mr. Kyle to cash one of the coupons for him, telling him that he sold his place to get money to buy the bonds. The next day he applied to Kyle to cash another of the coupons and told Kyle that that coupon belonged to his brother. Ruffin delivered the four bonds to Jones with the understanding that he should receive five hundred dollars for them. The next day Jones went on an excursion to Roanoke where, at the suggestion of John Henry Garland, he met the accused and told him about the bonds, and that they had been found by Thomas Ruffin in Lynchburg, and the accused said they could be cashed in Baltimore and agreed to go to Baltimore and get them cashed.

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The accused phoned Jones that he would be in Lynchburg on a certain train and asked Jones and Garland to meet him at the station, which they did. Jones thereupon delivered one of the bonds to the accused and went to his home and got the other three and upon his return delivered them to the accused and told him the bonds were found by a boy named Thomas Ruffin and that they came from the National City Bank in New York to the First National Bank of Lynchburg. The accused said he did not know where to put the bonds, that he ought to have a pocket in his coat sleeve, but did not, so he put them in his coat pocket. Accused had the bonds in his pocket in Lynchburg for several hours before their train left for Baltimore. He paid the railroad fare of all three to Baltimore and upon his arrival there met a former acquaintance, Dick Jones, who advised him to see one Davenport, through whom the accused sold one of the bonds for $600.00. The money, after paying Davenport $100.00 for his assistance, was divided among William Jones, Garland, Dick Jones and the accused. The accused telegraphed $110.00 of the amount he received to his home in Roanoke and left the other three bonds with Davenport with the understanding they would be sold the next morning.

The accused learned the next morning that the police were on his trail and at his suggestion all three left Baltimore in a hurry and got breakfast in Washington, without hearing from Davenport as to the sale of the three bonds. William Jones did not see either of the four bonds after he delivered them to the accused in Lynchburg and the accused had entire control of them from that time on. When the accused was arrested he denied that he had been to Baltimore or had any dealings with Garland, or William Jones.

The foregoing facts appear in the evidence introduced on behalf of the Commonwealth.

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The accused, the only witness sworn in his behalf, admitted that he made sale of one of the bonds in Baltimore and appropriated a part of the money to his own use, telegraphing most of it to his home in Roanoke; and that he left the other three bonds with Davenport in Baltimore to be sold. He denied that he received the bonds in Lynchburg, but did not deny that William Jones told him in Lynchburg that Thomas Ruffin found the bonds and that they were sent by the City National Bank in New York to the First National Bank in Lynchburg, Virginia.

The accused relies on nine assignments of error to the rulings of the trial court.

The first five relate to the introduction of evidence, and the first is based on the action of the court in allowing J. L. Jones, Assistant Cashier of the First National Bank of Lynchburg, a witness for the Commonwealth, to give testimony to the effect that the one bond which was recovered from a broker in Roanoke was like the four the accused was charged with having stolen, and that the envelope shown the witness, with red seal on the back, and the address of National City Bank, New York, at the bottom, was like the envelope in which all their Liberty Bonds came to his bank from National City Bank of New York. Counsel for the accused had already admitted that the bonds in question came from the National City Bank of New York to the First National Bank of Lynchburg by registered mail.

Thomas Ruffin testified that the package he found had a red seal in it, and a photograph of the registry receipt and a letter from the New York bank to the Lynchburg bank, showing a description of the bonds shipped, had been introduced without objection from the accused. Under these cirmcumstances the evidence objected to was clearly admissible to further identify the stolen property.

The second assignment is to the action of the court in permitting Thomas Ruffin, a witness for the Commonwealth,

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to testify to conversations he had with William Jones and one Kyle, out of the presence of the accused.

The tendency of the testimony of the witness, in his conversation with Jones, was to show that he did not know who the owner of the bonds was, at the time they came into his possession, and was not prejudicial to the accused. The testimony given touching a conversation with Kyle had reference to coupons Ruffin took from the bonds soon after they were found. If there be error in this ruling it was harmless.

The third assignment of error is to the action of the court in allowing John Henry Garland, a Commonwealth's witness, to make this statement: "On the 26th day of June 1921, Sunday morning, William Jones came to me and told me he had money enough to buy a Stutz roadster. I said, where did you get it, and he said, you will see, and on Monday morning * * * ."

It appears from the record that after the court had overruled the objection of the accused to this statement, counsel for the accused asked the same witness: "How many bonds did he tell you he had?" To which he replied, "he didn't say how many but told me Sunday that he had enough to buy a Stutz roadster." The court's ruling under the circumstances was not reversible error.

The fourth assignment has reference to the action of the court in permitting William Jones, a witness for the Commonwealth, to testify as to the disposition of the bonds in Baltimore. Being already in evidence that the accused had received the bonds at Lynchburg and carried them in his pocket to Baltimore, it was manifestly proper for the Commonwealth to show what became of the bonds after they reached Baltimore, and what part the accused took in disposing of them. Besides this witness was fully cross-examined as to this subject by counsel for the accused, and in addition, the accused subsequently also testified as to the same matter on direct examination. He therefore must

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be held to have waived his original objection. *Snarr* v. *Commonwealth,* 24 Va. App. 614; *N. Y. Life Ins. Co.* v. *Taliaferro,* 90 Va. 522; *Moore Lumber Co.* v. *Walker,* 110 Va. 775.

The fifth assignment of error is to the action of the court in permitting John Henry Garland to testify as to the same transactions in Baltimore, which were made the subject of the fourth assignment of error, when testified to by William Jones, and for reasons there stated is without merit.

The sixth, seventh and eighth assignments relate to the rulings of the court in granting and refusing instructions.

The instructions given by the court on the motion of the attorney for the Commonwealth, referred to in Bill of Exceptions No. 7 are as follows:

(1). "If the jury believe from the evidence beyond a reasonable doubt that when the bonds in evidence came into the possession of Thomas Ruffin or William Jones they knew or had means of knowing the owner or had reason to believe that the owner might be discovered and notwithstanding kept the bonds intending to appropriate them to their own purposes then the said Thomas Ruffin and William Jones were guilty of larceny and the bonds were stolen property."

(2). "If the jury further believe from the evidence beyond a reasonable doubt that the bonds were stolen property and that they came into the possession of the defendant, Lash Hutchinson, in the city of Lynchburg under such circumstances that the defendant must reasonably have known that they were stolen property, and that he took possession of them intending to convert them to his own use or to assist in disposing of them, then the jury should find the defendant guilty."

The instruction given by the court of its own motion, referred to in Bill of Exceptions No. 8, is as follows:

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"The court instructs the jury that before they can convict the accused they must believe beyond a reasonable doubt, first, that the Commonwealth has proved that the Liberty Bonds involved were previously stolen and were the property of the First National Bank; secondly, that the accused received them in the city of Lynchburg; thirdly, that at the time he received the said bonds he knew they had been stolen; which knowledge may be inferred from all the circumstances known to the accused prior to and at the time of receiving said bonds; and fourthly, that he received the said bonds with a dishonest intent, and unless the jury believe that the Commonwealth has proved each of these four elements beyond a reasonable doubt, they must acquit the accused."

The court further instructs the jury that if they believe from the evidence that the accused received the bonds in the city of Baltimore, in the State of Maryland, and not in the State of Virginia, they can not find the accused guilty although they believe that the bonds were stolen."

The ninth assignment of error is to the action of the court in refusing to set aside the verdict, and grant the accused a new trial, on the ground that the verdict is contrary to the law and the evidence.

These four assignments involve the law of the case and will be considered together.

The three instructions granted over the objections of the accused, quoted above, were more favorable to the accused than he was entitled to. No. 1 put upon the Commonwealth the burden of proving that Thomas Ruffin and William Jones were guilty of the larceny of the bonds, which under the evidence, was not necessary, before a verdict of guilty could be returned against the accusd. No. 2 required the Commonwealth to prove that the bonds were stolen property at the time the accused received them; and the remaining instruction required the Commonwealth to prove beyond a reasonable doubt that the bonds were previously

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stolen and that at the time the accused received them he knew they had been stolen, otherwise the jury must acquit him.

We are of the opinion that the jury were sufficiently instructed by the instructions granted by the court, and that there was no error in the action of the court in refusing to give the seven instructions asked for by the accused and referred to in Bill of Exceptions No. 6. It follows that the sixth, seventh and eighth assignments of error are without merit.

The accused being indicted for larceny and having failed, as he might have done under section 4451 of the Code, to demand a statement in writing from the attorney for the Commonwealth of what he intended to rely upon to ask for a conviction, the prosecuting attorney was entitled to ask for a conviction for receiving stolen bonds, or for receiving lost bonds, as might be shown by the evidence.

If any person buy or receive from another person * * any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted. Section 4448, Code 1919.

To constitute larceny of lost property, the person finding it must know, or have the means of knowing the owner, or have reason to believe that the owner may be discovered. and he must intend at the time of finding the property to appropriate it to his own use. *Tanner's case* 14 Gratt. 635.

We are of the opinion that there is sufficient evidence in the record to satisfy the jury that the accused received the bonds in Lynchburg knowing that they were the property of the First National Bank of Lynchburg and were stolen property. But, under the indictment charging the accused with the larceny of the bonds it was not necessary in view of the testimony for the jury to believe the bonds were stolen by Thomas Ruffin before they could convict the accused.

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The law is that, one who receives lost property from the finder directly or through another, assumes, in legal contemplation, as to the owner and the property, the relation occupied by the finder, placing himself in the finder's stead; and in such case, whether or not the person receiving he lost property is guilty of larceny, must be determined on the same principles that govern in the case of the actual finder.

In the case of *Allen* v. *State,* 91 Ala. 21, Clopton, J., speaking for the court says: "The charge to the refusal of which the first exception is taken asserts the naked proposition that if the money for the larceny of which defendant is indicted was found by his children and delivered to him, he cannot be guilty of larceny, whatever may have been his intent at the time of taking the money. Finding it, and its delivery to the defendant by the finder, did not deprive the money, as to the owner, of the character or status of lost property; the ownership remained in him, drawing to it, constructively, the right of possession. When defendant took the money from his children, he knew it had been lost, and took it as such. It is manifest the children had no felonious intent, and properly delivered the money to their father for his disposition. By receiving it from his children, knowing it was lost, defendant assumed, in legal contemplation, by voluntary substitution, as to the money and the owner, the relation occupied by the finders, placing himself in their stead. Otherwise a person knowingly receiving lost property from the finder, who had no intent to steal, with the felonious intent to appropriate it to his own use, escapes punishment. In such case, whether or not the person taking the money is guilty of larceny. must be determined on the same principles which govern the case of the actual finder."

In *State* v. *Dredden,* 6 Penn. (Del.) 446 (1907), the rule of the court is thus stated in the second paragraph of the syllabus: "If the defendant was not an actual finder of

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the property, yet if at the time he received it from the finder he knew or the circumstances then existing were such as to reasonably inform him, who the owner was, and notwithstanding such knowledge or means of knowledge he appropriated the property to his own use without the consent of the owner, he would be guilty of larceny."

It follows, therefore, that it is immaterial whether Thomas Ruffin at the time he found the bonds, knew, or had the means of knowing the owner, or took the bonds with intent to take entire dominion over them; and it was not necessary, in order to convict the accused, for the Commonwealth to prove that Thomas Ruffin was guilty of the larceny of the bonds.

Notwithstanding the innocence of Ruffin and Jones, if at the time the accused received the bonds in the city of Lynchburg, Virginia, he knew they were lost property and who the owner was, or had the means of discovering who the owner was, and took the bonds with the intent to convert them to his own use, he was guilty of the larceny of the said bonds.

The evidence plainly shows the accused was told in Roanoke that the bonds were found, and that he knew more about them than Jones and Garland knew; that when Jones delivered the four bonds to the accused in Lynchburg he told him they were found by Thomas Ruffin and were sent by the National City Bank of New York to the First National Bank of Lynchburg; that knowing these facts the accused took complete control of the bonds, with intent at the time of receiving them to appropriate them to his own use, and went to Baltimore and sold one of them and appropriated a good portion of the money to his own use, and left the other three there to be sold for him; that when arrested he denied he had been to Baltimore or had any dealings with John Henry Garland or William Jones; that although he testified in his own behalf he did not deny Jones' statement that he informed him at the time he delivered

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the bonds to him in Lynchburg that they were sent by the National City Bank of New York to the First National Bank of Lynchburg, and were found by Thomas Ruffin.

The ninth assignment of error is likewise without merit.

It follows from what has been said that there is no error in any of the rulings of the trial court of which the accused can complain; that the verdict of the jury was fully warranted by the evidence and that the judgment complained of is clearly right and must be affirmed.

Affirmed.

IVEY, ET ALS., v. LEWIS, ET ALS.

(*Wytheville, June 15, 1922.*)

1. EQUITY.—Sufficiency of Decrees—Sale Under Deed of Trust—Marriage Agreement — Repudiation — Contingent Remaindermen—Right to Maintain Suit—Prevention of Waste and Destruction—Jurisdiction of Court—Adjudication of Issue in Question.

Appeal from Law and Equity Court of city of Richmond.

Affirmed.

Scott & Buchanan, for the appellants.

Charles T. Lassiter and *Wm. Earle White,* for the appellees.

BURKS, J.:

This suit was brought by the appellants to recover possession of 68½ acres of land in Prince George county in which they had contingent remainders, and which they now claim by reason of the happening of the contingency upon which their estates were to vest in possession. They are entitled to recover unless barred by decrees in previous

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suits relating to the same lands to which they were parties. The trial court was of opinion that they were so barred and dismissed their bill, and from the decree dismissing the bill this appeal was allowed.

The appellants, who were the compainants in the trial court, are the only surviving children of Therina M. Ivey, whose maiden name was Therina M. Heath. On January 27, 1858, when Therina M. Heath, an infant, was about to intermarry with George W. Ivey, they entered into a marriage agreement which was signed and sealed by both of them, and duly admitted to record, whereby, amongst other things, in consideration of the intended marriage, she conveyed the said tract of land to Joseph H. Johnson upon the following trusts:

(1). That after their intended marriage, the said George W. Ivey shall have and possess all the property belonging to the said Therina M. Heath except certain cash and bonds which she may possess at the time and receive the profits thereof during the coverture of the said George W. Ivey and the said Therina M. Heath to his own proper use, and

(2). That at the death of the said Therina M. Heath the said Joseph H. Johnson, Trustee, shall deliver the property hereinbefore named to such person or persons as the said Therina M. Heath shall designate by will or other instrument of writing disposing of the property, and

(3). In the event that she leaves no will or other instrument of writing disposing of said property, then and in that event it is to be delivered to the heirs at law of the said Therina M. Heath.

(4). That should the said Therina M. Heath have any child or children by virtue of her intermarriage with the said George W. Ivey, and shall die leaving such child or children and the said George W. Ivey alive at her death, then and in that event the said George W. Ivey shall hold and possess and receive the benefit of said property for himself and said children, and at the death of the said

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George W. Ivey the property is to be delivered to said child or children, to them and their heirs forever.

(5). It is also further agreed "That said George W. Ivey and the said Therina M. Heath shall have the power during the coverture, by a writing acknowledged before two witnesses, to order the sale of any portion or all of said property by the said trustee, or to exchange it for other property, but the property or other consideration received from such sale or exchange shall be held by said trustee subject to all the conditions and restrictions which are herein set forth."

(6). The said property to be "in no way or manner subject or liable to the payment of any of the debts which the said George W. Ivey may at this time owe or which he may hereafter contract."

The marriage was duly had and solemnized. Five children were born of the marriage, but at the time of the death of Therina M. Ivey, the complainants were her only surviving children and heirs at law, and she left no will or other instrument disposing of said property. Geoge W. Ivey, the husband and father of the complainants, died on July 2, 1915. At that time Joseph H. Johnson, the trustee was dead, and his estate had been committed to J. H. Mercer, sheriff of the city of Richmond. The land was then in the possession of John W. Lewis, who claimed through mesne conveyances under the deed of trust executed in 1872, and a further conveyance executed in 1877, hereinafter mentioned.

By deed bearing date January 29, 1872, George W. Ivey and Therina M., his wife, conveyed the land to R. H. Jones, Jr., and George S. Bernard, trustees, to secure the payment of a note made by George W. Ivey and endorsed by Samuel Stevens, for $110.00, with interest at 10% per annum, held by the First National Bank of Petersburg. By deed bearing date March 15, 1877, duly acknowledged and admitted to record, George W. Ivey and Therina M., his wife,

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and R. H. Jones, Jr. and George S. Bernard, trustees, in consideration of four hundred dollars paid by the purchaser to George W. Ivey conveyed the land to B. B. Brooks. Thereafter Brooks applied to Johnson, trustee in the marriage agreement of 1858, to execute to him a deed for whatever interest he, the said trustee, had in the property, but Johnson refused to do so. Thereupon on October 30, 1877, Brooks instituted suit in chancery in the circuit court of the city of Petersburg, against George W. Ivey and Therina M., his wife, and Robert H. Jones, Jr. and George S. Bernard, trustees, J. H. Johnson, trustee, and Anna Ivey, Emmett Ivey, Richard Ivey and Charles Ivey, the last four being infants, and the only children of George W. and Therina M. Ivey, for the purpose of perfecting his title to said land.

The bill set out:

(a). The marriage agreement between George W. Ivey and Therina M. Heath, and the conveyance of the property in question accordingly by the deed of 1858 above referred to, the provisions thereof being set out somewhat at length;

(b). That said Ivey and Therina M. Heath were duly married, and the children above mentioned were issue of the marriage.

(c). That George W. Ivey and wife had, by the deed of January 29, 1872, conveyed the property to Jones and Bernard, tustees, for the purposes set out in that deed, and that default having been made in the payment of the debt secured therein, George W. Ivey and wife being anxious that the said debt should be paid off, the trustees, Jones and Bernard, with the concurrence of Ivey and wife, had made sale of the property to Brooks for the sum of $400.00 and had conveyed the property to said Brooks as set out in the deed of March 15, 1877, above mentioned.

(d). That said last-mentioned deed had been acknowledged before two magistrates by George W. Ivey and Therina, his wife, and duly admitted to record.

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(e). "That your complainant has been advised that he has the right to ask the assistance of this honorble court to perfect his title to the real estate aforeaid by compelling the said trustee to convey to him whatever interest he may have in said property."

The prayer of the bill was that the court would compel Johnson, trustee, to execute a deed to Brooks conveying whatever interest he might have in the real estate referred to, and for general relief. Johnson, Trustee, appeared and answered the bill at length, and objected to the execution of the deed on the ground that the sale was not authorized under the powers conferred by the marriage settlement of 1858. The cause was heard on the bill, the answer of Johnson, trustee, the general replication thereto, the answer of the infants by their guardian *ad litem,* and on the depositions of the witnesses. There was no appearance for Ivey and wife and the bill was taken for confessed as to them. The decree entered thereon in May, 1878, recited:

(1). That the tract of land in question was purchased by Brooks for $400.00, which sum was the fair value of said land, and that said Brooks had expended in improvements thereon not less than $400.00.

(2). That Ivey and wife are entitled to a life estate in said land, and under certain circumstances an absolute estate therein, and having joined in the deed to Brooks and received the purchase price, had parted with all their interest in said land.

(3). That the court is advised that the trustee, Johnson, had no funds with which to redeem the land, and that Ivey and wife and their children are in nesessitious circumstances, and that Brooks is willing to pay Johnson, the trustee, $100.00 for the use and benefit of the children, in consideration of the execution by Johnson, trustee, of a deed conveying said land to him with special warranty.

(4). That the court is of opinion that the proposal is a fair and just one and a reasonable compensation to the

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infant defendants for all probable losses by reason of the sale of the land by Ivey and wife to Brooks.

After making the foregoing recital the decree continues as follows:

"The court doth adjudge, order and decree that B. B. Brooks, the plaintiff, pay to J. H. Johnson, Trustee, as aforesaid, the sum of One Hundred Dollars with interest from June 1, 1878, upon the delivery to him by the said trustee of a deed with special warranty for the land in these proceedings mentioned, said deed to recite the fact that it is so executed by the order of the court in this cause; and the court doth further order that the said Johnson, when he shall have received the money aforesaid, after paying expenses incurred by him to his counsel, pay over the balance to the said Geo. W. Ivey and his wife to be expended by them in the support and the maintenance of the infant defendants, their children, taking their receipts for the same and filing it with the papers in this cause. And it appearing that nothing further remains to be done in this cause it is ordered to be removed from the docket, reserving leave to any party in interest to have the same reinstated for cause on petition."

It will be observed that under this decree Brooks was required to pay $500.00 for the land although the contract price was only $400.00, and of this $500.00 the sum of about $175.00 was necessary to pay off the debt secured by the deed of 1872, thus leaving a residue of about $325.00 which after the payment of costs went into the hands of George W. Ivey.

Johnson either failed or refused to accept the $100.00 and execute the deed required by the decree, and died without ever having executed the same. On June 3, 1879, Brooks filed a petition in the cause reciting the death of Johnson since the final decree without having executed the deed, and praying that a new trustee be substituted in his place. A rule was made against Ivey and wife and the guardian *ad*

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litem of the infants to show cause why a suitable trustee should not be substituted in the place of Johnson, but no process was taken against the personal representative of Johnson. On the return of the rule executed, the court substituted W. R. McKenney in the place of Johnson as trustee under the marriage agreement of 1858. McKenney accepted the $100.00, carried out the decree of the court, and executed a deed to Brooks by which he undertook to convey with special warranty whatever contingent interest the infants above mentioned then had or might thereafter acquire in and to the land in question. The case was thereupon dismissed from the docket.

It is earnestly insisted on behalf of the appellants that all of the proceedings in this suit were null and void. The appellee insists that the proceedings in said suit are not void and suggests, among other things, that the deed of trust of 1872 creating a mortgage on the land was a repudiation of the contract of settlement made by Mrs. Ivey while she was an infant, and that she had a right to repudiate it. At all events, that the decree entered in the case cannot be held to be void. The trial judge says with reference to the decree in that cause that "The adjudication may have been erroneous, but it was made upon the pleadings, and evidence taken, therefore could it be corrected except by appeal? Neither the trustee nor the guardian *ad litem* appealed, and as it seems to me the decree of the court was not void, I do not think it can be assailed collaterally. A court of equity should be alert to protect the interests of infants but infants properly made parties are bound by valid adjudications of their rights, with the reservations allowed in their favor by statute. *Harrison* v. *Walton,* 95 Va. 721."

In the view we take of the second suit to be hereinafter referred to, it is unnecessary to pass upon whether or not the proceedings in the foregoing suit were void or merely voidable.

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After the termination of the foregoing suit Brooks conveyed the land in controversy to F. J. Cech by deed dated March 14, 1891, and Cech by deed bearing date January 29, 1892, conveyed the same land to W. W. Townes. In the year 1892, sometime before the death of either Therina M. Ivey or George W. Ivey, the same persons who are the complainants in the case in judgment filed their bill in the circuit court of Prince George county aganst George W. Ivey and Therina M. Ivey, Jones and Bernard, trustees in the deed of 1872, W. R. McKenney, the substituted trustee in the place of Johnson, and B. B. Brooks and his alienees above mentioned. At the time of the institution of this suit W. W. Townes was in possession of the land claiming it as owner in fee under a conveyance from Brooks. The bill sets out:

(1). The marriage contract between George W. Ivey and Therina M. Heath and the deed pursuant thereto of January 27, 1858, above set out, which it is averred vested them with an estate in the said land.

(2). The conveyance thereof on January 29, 1872, by Ivey and wife to Jones and Bernard, trustees, to secure a debt of George W. Ivey, and the subsequent deed of March 15, 1877, to Brooks for the sum of $400.00 above mentioned, which it was averred was unconscionably small and less than one-fifth of the true value of the land.

(3). The suit subsequently brought by Brooks in the circuit court of Petersburg against Johnson, trustee, and Ivey and others, the proceedings therein as above set out.

(4). The payment by Brooks of $100.00 to McKenney, the substituted trustee, of which there remained after the payment of charges the sum of $43.55, which was paid George W. Ivey.

The bill avers that the proceedings aforesaid were irregular, fraudulent and void as to the children of Therina M. Heath, who, it is again alleged, had a vested fee simple estate in the property.

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The prayer of this bill was:

"Your orators do humbly and especially pray that all decrees and orders heretofore made in favor of B. B. Brooks and the conveyance made by Geo. W. Ivey and wife to Jones and Bernard, Trustees, and all subsequent conveyances *to* Geo. W. Ivey and wife to Jones and Bernard, Trustees, to B. B. Brooks, and W. R. McKenney, sub. Trustee, to Brooks and B. B. Brooks and wife to F. J. Cech, and F. J. Cech and wife to W. N. Ragland, and F. J. Cech and wife to W. W. Townes, be set aside and to be declared null and void on account of being a fraud upon the children as purchasers for a valuable consideration and to decree a strict settlement according to the marriage contract and the manifest intention of the marriage contract.

"Your orators further pray that the Hon. court decree that B. B. Brooks do pay a rental for the use and profit of the property; for the space of the occupancy.

"Also that he pay unto your orators a compensation for all waste and destruction which he occasioned while occupying the premises, to the detriment and injury of your orators. That your orators may have all such further and general relief in the premises as the nature of their case may require or to equity may seem meet."

Townes demurred to this bill and his demurrer was overruled by an order entered in the cause February 13, 1893. Brooks and Townes also filed separate answers upon which proof was taken, and the cause came on to be heard upon these answers, general replication thereto and the depositions. No decree was entered in the cause until December 1898, at which time Charles E. Ivey, who was an infant when the suit was brought, was of the age of twenty-three years. The final decree entered in the cause in December 1898 was as follows:

"This cause came on this day to be further heard upon the papers formerly read, upon the answer of W. W. Townes, and the answer of B. B. Brooks, heretofore filed in

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said cause; with general replication to said answers, and upon the depositions and other evidence duly taken and filed in said cause and was argued by counsel.

"On consideration whereof, the court is of opinion that the plaintiffs have failed to show any ground of relief against the defendants, or either of them, and doth adjudge, order and decree that the bill of the plaintiffs be dismissed and that they pay the defendants their costs by them about their defense in this behalf expended.

"But on motion of the plaintiff by counsel, it is ordered that this decree be suspended for 90 days upon plaintiff giving bond in the penalty of $100.00 as required by law in order that the plaintiff may present a petition for an appeal from this decree if they so desire."

It is earnestly insisted by counsel for the appellants (1) that at the time the suit of 1892 was brought the interests of the appellants were purely contingent and that they had no right to maintain such a suit, and that the subject matter of that suit was not the same as that involved in the suit in judgment, and (2) that it does not appear that the rights of the complainants in that suit were adjudicated upon their merit.

The prayer of the bill in the suit of 1892 was that all decrees and orders theretofore made in the former suit in favor of B. B. Brooks and the conveyance made by Geo. W. Ivey and wife to Jones and Bernard, trustees, and the subsequent conveyances by Geo. W. Ivey and wife and Jones and Bernard, trustees, to B. B. Brooks and W. R. McKenney, sub. trustee to Brooks, and the conveyances made by Brooks and wife to others down to the defendant Townes be set aside and declared null and void on account of being a fraud upon the appellants as purchasers for valuable consideration, and for a decree directing a strict settlement according to the marriage contract, and for an accounting of waste and rents and profits, and for general relief.

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The overrruling of the demurrer of the defendant Townes to the complainants' bill was an adjudication of the right of the complainants to maintain such a suit and to have relief therein if they established the case stated in their bill. The bill stated that the complainants therein held vested remainders in the land, but the marriage settlement was filed as an exhibit therewith and the derivation of the complainants' title therefrom was set forth in the bill, and it is conceded by counsel on both sides that the remainders were contingent. Under these circumstances it is now contended by counsel for the appellants that "said complainants had no existing estate in the land and no present right of action for the correction of the wrongs complained of, if indeed the acts complained of constituted wrongs. In other words, it is clear that the complainants in *Ivey et als.* v. *Ivey et als* (the suit of 1892) had no cause of complaint or right of action *at that time.*"

In this contention we cannot concur. It seems plain that the object of the bill was the conservation and preservation of the principal of the trust subject so that the same should be forthcoming upon the happening of the contingency that should determine the character of their estate if any. It is true that the subject matter of the trust was land which could not get away, but the object of the suit was to establish title to the land in the trustee under the marriage agreement and the rights of the complainants therein as remaindermen, and to cancel the proceedings in the former suit as clouds on the title of the trustee through whom they claimed. No authority is cited for the proposition that contingent remainder-men cannot maintain such a suit.

It seems to be well settled that contingent remainder-men may maintain a suit to enjoin waste being done or threatened upon the principal estate. *Perot* v. *Perot,* 3 Atk. 94, 23 Eng. Reprint 857; *Birch-Wolfe* v. *Birch,* 9 L. R. Eq. 683; 1 White & Tudor L. C. 989; *University* v. *Tuc-*

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ker, 31 W. Va. 621, 8 S. E. 410; *Williamson* v. *Jones*, 43 W. Va. 562, 64 Am. St. 891; *Latham* v. *Roanoke R. Co.*, 139 N. C. 9, 111 Am. St 764, 51 S. E. 780; 40 Cyc. 528, and cases cited in note 19.

As a contingent remainderman has no vested interest in the property he cannot maintain a common law action to recover waste or damages in the nature of waste, but "the rights of a contingent remainderman are much more extensive in equity than at law, for while he will not be allowed to recover damages for that which may not be his, he should be allowed to prevent the destruction of that which may become his." 16 Cyc. 658. This statement of the text is quoted with approval in *Canada* v. *Daniel*, 175 Mo. App. 55, 157 S. W. 1032.

In *Watson* v. *Wolff-Goldman Realty Co.*, 128 S. W. 581 (Ark.) cited with approval in *Evans* v. *Pettus*, 166 S. W. 955, 958, it is said "It is a rule of universal application that a contingent remainderman may obtain relief in equity by injunction to prevent waste, and this remedy is given him on the theory that he is entitled to prevent the loss or destruction of that which may become his at the termination of the life estate."

In 1 Daniell's Ch. Pl. & Pr. (4th ed.) 316, in discussing suits which may or may not be brought by a contingent remainderman, it is said: "But it must not be supposed that contingent remaindermen can in no case be plaintiffs; for in many cases (such as suits for the administration of, or to secure, the trust property to which they are contingently entitled) such persons may properly be plaintiffs and orders have been made at the suit of such persons for the payment of trust funds into court."

The prayer of the bill, amongst other things, is for an accounting for waste and for rents and profits. Clearly, the complainants could have no accounting for rents and profits, as these belonged to the life tenants who had parted with them, and in no event were the complainants entitled

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to them. As to the waste, there were no allegations in the bill that any waste was being done or threatened, and in the absence of such allegation there could be no recovery therefor. The allegations of the bill are confined to the proceedings in the former suit and what was done in derogation of the complainants' rights under the marriage settlement, and that the land had been sold to Brooks at a grossly inadequate price.

The reason why a contingent remainderman in fee may enjoin threatened waste is because waste is a partial diminution of that which may become his, and upon the same principle he may apply to a court of equity for the preservation and conservation of the whole of the principal which is threatened with loss or destructon by reason of the improper conduct of the life tenant. It is not necessary for a contingent remainderman in fee to bring suit to compel the restitution of misappropriated funds and he will not be guilty of laches if he fails to do so before his estate vests, but if he does so, he will be bound by the results of the litigation. So in the case in judgment, it was not necessary for the complainants to have brought the suit of 1892, but having done so they are bound by the results thereof. The suit of 1892 was in effect a suit to have the lands restored to the trustee under the marriage settlement, and to remove the clouds on his title occasioned by the proceedings in the former suit. *Sedwick* v. *Taylor*, 84 Va. 820, was in many respects similar to the case in judgment. In that case a house and lot in the town of Manchester was conveyed to a trustee upon trust to permit Martha Taylor to have free and undisturbed possession and take to her use the rents and profits thereof during her natural life, and after her death the property was to be held by the trustee for the benefit of all the children of Mrs. Taylor by her then husband, who might be living at her death, and the heirs of such as might have died during her lifetime leaving issue. The trustee was also authorized to convert the land into

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money or other property "to be held as aforesaid." The property was subsequently sold by the trustee under authority of the deed of settlement and constituted the fund in controversy. The trustee from time to time paid over to the life tenant different portions of the purchase money until he paid her the whole amount for the maintenance and support of herself and infant children. It was conceded that the remainder in the children after the death of Mrs. Taylor was a contingent remainder. That suit was brought by the only surviving child of Mrs. Taylor and during her lifetime. The object was to have an accounting from the estate of the trustee who had died, and the restoration of the principal of the trust fund for the use of the son in the event that he should survive his mother. As Mrs. Taylor was entitled to the use of the fund during her lifetime and the whole of it had been paid to her, of course she could not demand the interest on the fund during her life, nor could the son because he was not entitled to it. But it was held that the son, although his remainder was contingent, could maintain the suit and that an accounting and resitution would be ordered. In the course of the opinion it is said: "The life tenant is still living; and the interest in remainder, under the trust deed, being contingent, the right to demand payment of the principal fund has not yet accrued. It was competent, however, for the male appellee to maintain a suit to have the fund collected and his interest protected."

In *Stewart* v. *Conrad*, 100 Va. 128, 135, it was said: "The remaindermen, under the terms of the law creating the trust fund are not entitled to the possession of any part of it until the death of the life tenant, who was a party to this suit, and who, so far as this record shows, is still alive. Until her death appellants would have no standing in court except to ask a court of equity to prevent or remedy a violation of the trust and to preserve the trust fund. They had the right to invoke the aid of a court of

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equity for those purposes, but they were under no legal obligation to do so, and the objection of laches or acquiescence will not lie for their falure to assert rights which have not yet accrued. *Effinger* v. *Hall,* 81 Va. 94; *Sedwick* v. *Taylor,* 84 Va. 820."

In *Ford* v. *Hurt,* 155 S. W. 927 (Tenn.) there was a devise of lands to one Mary A. Ford for her life, and "at the death of Mary A. Ford to be equally divided among said children or representatives of them, as she may leave surviving her, and should she leave no child or children, or the representatives of them surviving her, then the said property is to return to my heirs or distributees." The bill alleged that the defendant, Hurt, had purchased of the life tenant her estate and that the parents of the complainants (now deceased) joined in the execution of the deed of conveyance to her. It further alleged that in order to defeat complainants in their rights Hurt had purposely allowed the land to be sold for taxes, which he should have paid, and had caused the property to be purchased at the tax sale by his co-defendant who was his relative and agent. The bill, among other things, prayed for setting aside of the tax title aforesaid. The defendants demurred to the bill on the ground, among others, that complainants were not vested with such an interest in the land as qualified them to maintain a bill of complaint in that their interest is but a contingent one, a possible or probable one, that may never ripen into title to the lands. But it was held that the bill was maintainable although the complainants were only contingent remaindermen. It was said further "certainly this should be the rule in this State where the doctrine obtains that such a remainder, though contingent, presently vests in the described class as a class * * * and complainants as the only existing representatives of the class that may take, should be allowed to protect the estate so vested, whether they or others responding to the class at the death of the grandmother, Mary A. Ford, shall actually take under the will."

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The suit brought in 1892 was one that the complainants therein had the right to bring. The court in which it was brought was a court of general jurisdiction, and had jurisdiction of suits of that character. It acquired jurisdiction of both the subject matter and the parties, and the suit was proceeded in in the usual and regular manner to a final decree. The adjudication was, therefore, binding on the parties thereto.

But it is earnestly insisted by counsel for the appellants that there was no adjudication of the case on the question involved in the case in judgment, that it may have been decided on the ground that appellants had no right to maintain the suit and that the burden is on the appellee to show that the question here involved was there decided.

There has been a want of harmony in the decisions of this court and also of the Supreme Court of the United States as to whether the first suit concludes all questions which might have been decided under the pleadings in that case or is restricted to the points actually decided. This subject is discussed and the cases cited by the author of this opinion in 3 Va. Law Reg. 273, but it is not necessary to pass upon it in the present case. For if it be conceded that the doctrine of *Chrisman* v. *Harman*, 29 Gratt. 494, (that the precise question must have been raised and determined in the former suit) should be adhered to, the appellants have not brought themselves within the rule there laid down.

A lengthy extract is made from the brief of counsel for the defendants in that suit to show that the case went off on the ground of the inability of the complainants to maintain that suit, but we do not attach great importance to that fact as the courts often have to base their conclusions on different grounds from those assigned by counsel, and the overruling of the demurrer of the defendant Townes to the complainants' bill was an adjudication of the right of the complainants to maintain the suit. The final decree

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in the case, as we have seen, dismissed the bill at the complainants' costs because the court was of opinion "That the plaintiffs have failed to show any ground of relief against the defendants, or either of them."

The answer of Brooks filed in the cause denied any title or interest, vested or contingent, in the complainants in that suit. When the bill and exhibits, and the answer aforesaid and other papers upon which the cause was heard are read in connection with the decree aforesaid, we cannot doubt that the decree was an adjudication against the complainants in that suit upon the only issue made by the pleadings in the cause, which was the validity of the proceedings by which Brooks acquired title to the land in controversy. This was manifestly the view of the counsel for the complainants at that time, as the decree shows that its operation was suspended to enable the complainants to take an appeal. Certainly, the proceedings in that suit were not void, and cannot be collaterally assailed. Seven years thereafter, to-wit, on the 6th day of April, 1905, Townes sold and conveyed the land to John W. Lewis, the appellee.

We are of opinion that the decree last aforesaid is a bar to the present suit of the appellants, and hence the decree of the Law and Equity Court of the city of Richmond is affirmed.

SIMS, J., dissenting:

I find myself unable to concur in the majority opinion, or in its conclusion.

As it is well settled that a court of equity has no inherent jurisdiction to sell infants' lands, but only when the proceedngs are in substantial accord with the statute on the subject; and as the proceedings in the first suit mentioned in the opinion made no approach to conformity with the statutory requirements; the bill although recognizing the existence of the trust, and so of the interests of the infants,

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did not even ask for a sale of those interests; the decree undertook to sell such interests without any pleading, even asking that that be done; it seems manifest that the decree in that suit under which the interests of the appellants were attempted to be sold and conveyed was absolutely void, and, hence, so was the deed of conveyance thereunder. *Coleman* v. *Va. Stave Co.*, 112 Va. 61; *Brenham* v. *Smith*, 120 Va. 30.

With respect to the second suit, this only need be here said:

It is true, in view of what is the correct construction of the marriage settlement which is filed as an exhibit with the bill and made a part thereof, it may be said that the bill on its face showed that the interests of the complainants were contingent interests. The suit was instituted and the final decree therein was entered while the life tenant was still living and many years before the interests of the complainants became vested interests. But the bill alleged that the interests of the complainants were vested remainders in fee, and not contingent interests; it was expressly stated that the improvements made upon the property had "had no tendency to diminish in value in the smallest degree nor lessen the interests of the" (complainants); and all of the relief sought was present relief to which it was claimed that the complainants were entitled "as purchasers for a valuable consideration" having then-existing interests. This was the particular claim or demand which was made by the bill, and which alone, so far as the record shows, was litigated in that suit. No issue was tendered by the bill of any right or need of preservation of the *corpus* for the future enjoyment of any persons having a contingent interest therein. The order overruling the demurrer to the bill does not specify the grounds on which that action was taken, and so cannot be considered as embodying the view of the court that it had and would take jurisdiction of the case, even if the complainants had merely a contingent es-

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tate. The natural inference is that the court in overruling the demurrer did not determine that question at all and merely reserved its decision of all questions presented by the bill until the other pleadings and the proof were all in. Certainly that order was not a final judgment or decree, and hence cannot be considered as in bar of any of appellants' rights. And when we come to the final decree, we see that the cause was brought on "to be farther heard upon the papers formerly read, upon the answers * * heretofore filed * * with general replication to said answers and upon the depositions and other evidence duly taken and filed in said cause, and was argued by counsel." Thereupon the decree of the court was as follows: "On consideration whereof, the court is of opinion that the plaintiffs have failed to show any ground of relief against the defendants, or either of them," and dismissed the bill. When this decree is read in the light of the pleadings, it does not appear that the court ever took jurisdiction of the subject of the preservation of the *corpus* in order to protect the interests of any contingent estate therein. Indeed the inference seems irresistible that the court dismissed the bill on the ground that the complainants failed to show any vested interests, such as were asserted in the bill, and, hence, failed to show any ground of relief against the defendants, such as was sought by the bill. This being true, it seems plain that that cause was disposed of on a ground which did not go to the merits of the suit in which the decree under review was entered, and, therefore, is no bar to the relief sought in the latter suit. *Chrisman* v. *Harman*, 29 Gratt. (70 Va.) 494; *Withers* v. *Sims*, 80 Va. 651; *Dillard* v. *Dillard*, 97 Va. 434; *Taylor* v. *Hendrick*, 110 Va. 461; *Hairston* v. *Hairston*, 117 Va. 207; *Bayly* v. *Curlette*, Idem 253; *Steinman* v. *Clinchfield Coal Co.*, 121 Va. 611; *Payne* v. *Buena Vista Co.*, 124 Va. 313.

Whatever may be the correct rule with respects to what matters are concluded by a preceding suit which may have

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been but were not in fact presented for decision, all of the authorities concur in the view that only such matters are thus concluded, against the complainant in a preceding suit, which were "presented or presentable to sustain the particular demand litigated in the prior suit." *Legrand* v. *Rixey*, 83 Va. 862; *Withers* v. *Sims, supra,* (80 Va. 651, 660-1); *Dillard* v. *Dillard, supra,* (97 Va. 434, 437); and other cases cited in note 3 Va. Law Reg. 273, *et seq.* And, as we have seen, "the particular demand" in the prior suit which we have under consideration was not the demand involved in the present suit but a wholly different one. Then, too, the demand in the present suit is one which admittedly the appellants had the right to delay in making until their estates became vested. Hence, they violated no rule of procedure whatever when they did not put in issue or litigate that demand in the prior suit, which was instituted and decided at a time when the estates were contingent. Therefore, no estoppel can arise from that circumstance.

Affirmed.

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VIRGINIA APPEALS

The Earliest Report of All Current Decisions of The Supreme Court of Appeals

Vol. 26 AUGUST 1922 No. 2

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N. B.—All opinions printed in this number are subject to rehearings which may be granted under the above statute.

JUDGES.

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HON. FREDERICK WILMER SIMS. *HON. JESSE F. WEST.

*Elected to succeed Hon. Edward W. Saunders, died December 16, 1921. Judge West was seated February 1, 1922.

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VIRGINIA APPEALS

JAMES *v.* COMMONWEALTH.

(*Wytheville, June 15, 1922.*)

1. APPEAL AND ERROR.—Bills of Exceptions—Time for Signing—Code, sec. 6252.

Error to Circuit Court of York county.

Dismissed.

F. S. Collier, C. V. Spratley and *J. T. Newsome,* for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

The petition for the writ of error in this case assigns three errors, all of which are dependent for support upon the bills of exceptions taken in the cause. There are four of such bills of exceptions, the first three of which bear no date, and there is nothing in the record to show when they were in fact signed. A motion to dismiss on this ground was made by the attorney-general.

In order that a bill of exceptions may be considered by this court, it must affirmatively appear from the record that the bill was signed by the judge of the trial court within the time prescribed by law.

In *Standard Peanut Co.* v. *Wilson,* 110 Va. 650, 652, 3 Va. App. 910, the record did not show the time of signing or filing of the bills of exception, and it was there said that,

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"Unless the record affirmatively shows that bills of exception were signed in accordance with" the provisions of the statute, they do not constitute part of the record. That is the tenor of our decisions, which conform in that respect to the general rule of procedure on the subject.

" 'A bill of exception, not dated and not containing a statement that it was signed by the presiding judge within the time allowed by orders extending the time for its signing, will not be considered.' *Keller* v. *State,* 145 Ala. 680, 40 So. 85.

" 'Where time is given, extending beyond the term, in which to file a bill of exception, it must be filed within the time limited, or it will constitute no part of the record; and a bill of exception is no part of the record unless the record shows when it was filed.' *Port* v. *Russell,* 36 Ind. 60.

" 'Where time has been given beyond the term for filing a bill of exception, the transcript must affirmatively show that it was filed within the time limited.' *Wiggs* v. *Koontz,* 43 Ind. 430; *Toledo W. & W. R. Co.* v. *Howe,* 68 Ind. 458."

There are many other authorities to the same effect. See *Wendleton* v. *Kingery,* 110 Mo. App. 67, 84 S. W. 102; *Emmett* v. *Farrow,* 136 Ala. 512, 34 So. 932; *Burns* v. *Gibbs,* 147 Ala. 701, 41 So. 303; *Vickers* v. *Sanders,* 106 Ga. 265, 32 S. E. 102; *Chicago &c. R. Co.* v. *Pearce,* 118 Ark. 6, 175 S. W. 1160; *Crawford* v. *Goodwin,* 128 Ga. 134, 57 S. E. 240. See also *Buena Vista Co.* v. *Hickman,* 108 Va. 665, 667, 2 Va. App. 661; *Thornton's Case,* 113 Va. 736, 6 Va. App. 99.

The authorities cited show plainly that the first three bills of exception are not parts of the record and hence cannot be considered by this court.

The fourth bill of exception, as printed in the record, has on it, though below the signature of the judge and not formally a part of the bill, the date June 7, 1921. If we assume this to be the date of the bill, and also that the other three were signed on the same date, it will not help

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the plaintiff in error, as it came too late. Final judgment was entered in the case April 8, 1921, and the bill not signed till June 7, 1921. The latter date was the sixty-first day. *Kelly* v. *Trehy,* decided to-day.

The writ of error will be dismissed as improvidently awarded.

Dismissed.

JUNIPER LUMBER CO. *v.* JOHN M. NELSON CO., INC.

(*Wytheville, June 15, 1922.*)

1. CONTRACTS.—Sales Agent—Commission—Mutual Cancellation of Contract—Claim for Loss of Commissions on Account of Breach Before Cancellation—Evidence.

Error to Circuit Court of city of Norfolk.

Reversed.

G. M. Dillard, for the plaintiff in error.

Hugh W. Davis and *Wm. L. Parker,* for the defendant in error.

The plaintiff in error, hereafter called the Juniper Co., complains of a judgment against it in favor of the defendant in error, hereafter called the Nelson Co., and the controversy arises out of these facts:

The Juniper Co. owned several tracts of standing timber in North Carolina, and was engaged in the business of manufacturing its timber into lumber. The Nelson Co. was engaged in the business of selling lumber in the city of Baltimore, Md. The two corporations entered into a contract whereby the Nelson Co. agreed to advance to the Juniper Co. $15,000 on December 1, 1919, which was secured by a second mortgage on the property of the borrower

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evidenced by a note payable June 1, 1920, in consideration of which the lender was given the exclusive agency to sell the Juniper lumber manufactured by the Juniper Co. for an indefinite time, in consideration of a commission of 10 per cent of the net proceeds of sale, and the lumber was to be supplied, at the rate of 200,000 feet per month, beginning March 1, 1920, to be sold at current market prices and accounted for. The $15,000 loan, instead of being received December 1, 1919, was not received by the borrower until January 31, 1920. The failure to receive this amount, together with the difficulty of obtaining the necessary labor to operate the mill, are stated to have contributed to the failure of the Juniper Co. to manufacture and ship the quantity of lumber required by the contract. The Juniper Co. asked for an extension of time for the payment of the loan, as well as for an abatement of two months interest, while the Nelson Co. insisted upon the proper payment of the loan with six months interest. Representatives of the two companies met at the office of Mottu & Co. on May 20, 1920, ten days before the loan matured, it then being manifest that their plans had miscarried and that it was necessary to readjust them. This conference resulted in a promise that the Juniper Co., through its agents, Mottu & Co., would secure funds to take up the $15,000 loan on the day of its maturity, June 1, 1920, in response to the insistence of the Nelson Co., and that thereupon the sales agreement should be released and cancelled.

May 29, Mottu & Co., representing the Juniper Co., wrote to the Nelson Co. reminding them of the agreement of May 20 to release the sales agreement, and requested that the notes be presented for payment June 1, accompanied by a release of such sales agreement, in accordance with previous understanding. These notes were presented in Norfolk at maturity June 1, and fully paid, with six months interest from December 1, 1919, although the money had only been used by the Juniper Co. for four months. On

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the same date this telegram was sent to Hugh W. Davis, attorney representing the Nelson Co. in Norfolk:

"This will authorize you to release our sales agreement with Juniper Lumber Company on payment of fifteen thousand dollars notes due today.

"John M. Nelson, Jr., Inc., per John M. Nelson, Jr., Prest."

On the same date Mr. Davis transmitted this telegram to the Juniper Lumber Company with a letter reading thus:

"Upon authority contained in the enclosed telegram dated June 1, 1920, and hereto attached, I hereby release, on behalf of John M. Nelson, Jr., Incorporated, the Juniper Lumber Company from the further performance of a certain sales agreement bearing date January, 1920, between said Juniper Lumber Company and said John M. Nelson, Jr., Incorporated, it being understood and agreed that the said agreement shall be cancelled as of this date and the copies thereof now in the possession of the parties cancelled as of this date and exchanged."

On the same date Mottu & Co. wrote to the Nelson Company thus:

"We have today taken up the three notes made by the Juniper Lumber Company in the sum of $5,000 each, with 6 mos. accrued interest—an aggregate payment of $15,-450.

"We have before us your telegram to Mr. Hugh W. Davis, in which you authorize him to release the sales agreement between yourselves and the Juniper Lumber Company, and he has written us a letter covering this release, and stating that the copy of the agreement in your possession, duly released, would be sent to us by you. We hope to receive this at your earliest convenience."

To this letter no reply was made by the Nelson Company, and June 5 Mottu & Co., for the Juniper Co. wrote thus to the Nelson Co.:

"We are trying to wind up the affairs of the Juniper Lumber Company. Referring to their shipments for your account to Philadelphia, May 13th tank plank, May 30th

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shingles, will you be good enough to send us an account-sales covering these two cars, and if you have received settlement therefor, your check for any balance that may be due us; we understand, of course, that the shipment of June 10th, boat boards and pine stock, has not yet reached its destination. Thanking you for your attention," &c.

No reply was made to this letter. Then July 31, 1920, Mottu & Co. wrote another letter to the Nelson Co.

"As a matter of record and to keep the title clear, we beg to request that you be good enough to execute and return to me *soonest* possible the enclosed release of the rights of your company as sales agent under the deeds of trust of the Juniper Lumber Company.

"May we also call your attention to the fact that settlement has not yet been received covering the three cars of lumber shipped you May 13/20. As we are very anxious to close up the affairs of this company at the earliest possible date, we will greatly appreciate receiving your account sales covering these shipments, with check to balance.

"Thanking you for your prompt attention to the above, we are" &c.

To this no reply was received. Then, on August 11, this letter was written:

"Mr. Jno. M. Nelson, Jr., President,
"Jno. M. Nelson, Jr., Inc.,
"Baltimore, Maryland.

"Dear Sir:

"Will you be good enough to inform us if you received our letter addressed to you under date of July 31st, enclosing release deed for your execution. If so, kindly let us have said deed at your earliest convenience, also settlement for the lumber shipped you so long ago.

"Thanking you in advance, we are

"Very truly yours,
(Signed) J. P. Andre Mottu,
For Juniper Lumber Company.

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The reply to that letter stated that the matter would be taken up by their attorney at Norfolk.

There was no further action or communication until October 8, when this proceeding was instituted by an attachment sued out by the Nelson Co. against the property of the Juniper Co. The defendant denied liability and filed its counterclaim against the plaintiff for a balance alleged to be due for lumber shipped, some before and some after June 1st, the date of the cancellation, amounting to $2,568.78.

The Nelson Co. claimed $4,500, the amount of the commission which would have been earned if the amount of lumber required by the sales contract had been shipped between March 1 and May 30, 1920, subject, however, to a credit of $837.13, the net proceeds of sales of lumber which had been actually shipped by the Juniper Co. which amount was admitted to be due therefor.

There was a jury trial and a verdict in favor of the plaintff for $3,292.48, which the Juniper Co. moved to set aside upon the ground that it was contrary to the law and the evidence, which motion being overruled, judgment on the verdict was entered, and a writ of error has been allowed to that judgment.

The question presented, then, is whether or not the mutual release and cancellation of June 1st, extinguished or left unimpaired the right of action and claim of the Nelson Co. for damages arising out of the loss of the commissions which would have been earned before the cancellation if there had been no breach.

While we have been referred to no case in which the facts were precisely like those here presented, there have been a number of precedents directly or indirectly involving the question, and the principle appears to be very well settled.

In *McCreery* v. *Day,* 119 N. Y. 1, 23 N. E. 198, 16 Am. St. Rep. 793, 6 L. R. A. 503, it is held that where the parties to a contract mutually agree to its cancellation, their rights

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as to matters arising prior to the date of the cancellation depend upon the intention to be deduced from the agreement of cancellation, construed in the light of the attending circumstances—that is to say, that such contracts are construed according to the general rules governing contracts. It is further said: "Where a contract is rescinded while in course of performance, any claim in respect of performance or of what has been paid or received thereon, will ordinarily 'be referred to the agreement of rescission; and in general no such claim can be made unless expressly or impliedly reserved upon the rescission.' Leake, Cont. 788, and cases cited."

The same language is adopted as correctly stating the rule in *Eames Vacuum Brake Co.* v. *Prosser*, 157 N. Y. 295, 51 N. E. 986.

In *Winton* v. *Spring*, 18 Cal. 455, the same doctrine is expressed, and the opinion concludes with this pertinent language: "It is much more probable that when parties come to an agreement of a business matter, they settle all the terms of the contract, than that they leave them unadjusted. The word 'cancel,' applied to the agreement, under the circumstances, means no more than 'doing away with' an existing agreement upon the terms and with the consequences mentioned in the writing. What is not said, is excluded; and whatever was meant to be oblgatory was expressed."

Applying the same rule, this is said in *Ralya* v. *Atkins & Co.*, 157 Ind. 338: "It is not material whether there had been any breach of said contract by appellee or whether appellant had the right to rescind the same on that account, for when a party, even without right, claims to rescind a contract, if the other party agrees to the rescission, or does not object thereto and permits it to be rescinded, the rescission is by mutual consent. 2 Parsons on Cont. (8th ed.), pp. 677, 678, bot. p. 793, 794; *Folsom* v. *Cornell*, 150 Mass. 115, 22 N. E. 705; *Alden* v. *Thurber*, 149 Mass. 271,

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21 N. E. 312. The general effect of a rescission of a contract is to remit both parties to their original rights in respect to the subject matter thereof. 21 Am. & Eng. Ency. of Law 92-94; *Briggs* v. *Murtha,* 12 Phila. 179; *Raymond* v. *Bearnard,* 12 Johns. (N. Y.) 274, 7 Am. Dec. 317, 319; *Gillet* v. *Maynard,* 5 Johns. (N. Y.) 85, 4 Am. Dec. 329. It is evident that when a contract is rescinded by mutual consent or otherwise, no action can be maintained for a breach thereof. 21 Am. & Eng. Ency. of Law 92-94; *Haldeman* v. *Chambers,* 19 Tex. 1, 51, 52; *Briggs* v. *Murtha, supra; Kinney* v. *Kiernan,* 49 N. Y. 164; *De Peyster* v. *Pulver,* 3 Barb. (N. Y.) 284; *Davis* v. *Street,* 1 Carr & P. 18, 19, 12 Eng. Com. Law 23, 24. It follows that if said contract was rescinded as alleged, appellant could not recover thereon for anything that occurred before or after the rescission."

So also, in the case of *Dreifus* v. *Columbian Exposition Salvage Co.,* 194 Pa. St. 475, 45 Atl. 372, 75 A. S. R. 704, it is held that where the defendant declared that it would not perform its contract to deliver to plaintiff certain quantities of steel, of specified kinds, at stated prices, they entered into a new contract, reciting the cancellaton of the old contract, and acceptance in lieu thereof of an agreement to furnish certain other amounts of other kinds of steel, there is a consideration for the new contract, and a compromise of the old one." And it is said that the term "cancellation" of a contract necessarily implies waiver of all rights thereunder by the parties.

In *Schwab Safe & Lock Co.* v. *Snow,* 47 Utah 202, 152 Pac. 171, referring to certain contracts for sales of iron safes, this is said: "The defendant, no doubt, had a right to propose the cancellation of any order that had been accepted by the plaintiff, and the plaintiff had a clear legal right to accept his proposal. After the proposal to cancel any standing order was accepted, that terminated the contract respecting the order thus cancelled, and we cannot

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see how the same could be reinstated, except by a new agreement between the parties. To be more specific: The order by the defendant and the accetance thereof by the plaintiff, as a matter of course constituted a contract binding upon both parties. The defendant, however, proposed an unconditional cancellation of the order, and the plaintiff accepted the proposition. This, in law, constituted a rescission or cancellation, whatever it may be called, of an executory contract by mutual consent, and in view that the contract was executory the acceptance by plaintiff of defendant's proposal to cancel or rescind the order was a sufficient consideraton to support such rescission or cancellation. 1 Page on Contracts, section 317. In view, therefore, that the defendant unconditionally cancelled the order and the plaintiff unconditionally joined in the proposed cancellation, it inevitably follows that the contract which arose by reason of the accepted order ceased to exist. In view that the contract was executory, if it was cancelled or rescinded as to one party, it of necessity must also have ceased to exist as to the other. To illustrate: Suppose the plaintiff had sued the defendant for a breach of the contract after it had accepted his proposition to cancel the order could it maintain an action for breach of contract? The question answers itself. If, therefore, the contract is cancelled so that one of the parties may not sustain an action for its breach, it must likewise be so as to the other, unless there is a reservation of some kind by one of the parties. In view of the unconditional cancellation of the order for the Bishop safe by the defendant and its unconditional acceptance by the plaintiff, we think the defedant cannot recover damages as for a breach of the contract which arose from the acceptance of the cancelled order." 6 R. C. L. 942; 13 C. J. 603; 3 Williston on Contracts, sec. 1827; 2 Black on Rescission & Cancellation, sec. 535.

The defendant in error cites and relies upon three cases—*Hayes* v. *City of Nashville,* 80 Fed. 641, 26 C. C. A. 59

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(which is a case of rescission by one party pursuant to the contract and hence is inapplicable); *Alabama Oil &c. Co.* v. *Sun Co.*, 99 Tex. 606, 92 S. W. 253; and *Garrett* v. *Danner*, (Tex. Civ. App.), 146 S. W. 678. We do not think any good purpose could be served by analyzing these cases, and deem it sufficient to say that each of them expressly recognizes the doctrine to which we have previously referred as applicable to cancellations or rescissions of executory contracts by mutual consent of the parties, and that we decline to follow them in so far as they express views contrary to those here expressed.

Reverting to the facts of this case, then, and applying these principles thereto, we find that the only ground upon which it is sought to sustain the judgment is based upon the letter of the attorney for the Nelson Co. to Mottu & Co. of June 1, and the language relied on is that it is there stated that the Juniper Co. was relieved from "further performance" of the sales agrement, which should be "cancelled as of this date." Upon this the whole case for the Nelson Co. rests, and it is claimed that because of this language used after the terms of the cancellation had been agreed to, which it must be noted was neither contained nor suggested in the telegram from his principal authorizing him to consummate the previous understanding of the parties, we should construe this contract as meaning that the Nelson Co. retained and reserved from the operation of its agreement its right to sue for the past breaches of the contract. The true rule of law is that when an executory agreement partly performed is thus mutually cancelled, if any right is reserved to recover unliquidated damages arising out of a previous breach thereof, it should be reserved expressly, and that the burden is upon one who alleges such a reservation to show that this was the mutual understanding. A mutual rescission, abrogation, release, or cancellation, of such contract, without reservations, terminates it

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so as to preclude the recovery of damages for any previous breach thereof.

There is little conflict in the parol testimony. The Nelson Co. was anxious to have the $15,000 loan returned to it, and the Juniper Co. was in such financial condition that it was unable to do so unless it could regain control of its property and be relieved from the obligations imposed by the sales agreement, and it is perfectly clear that the Juniper Co. and its representatives construed the cancellation agreement as absolute and unconditional. If this claim had been asserted at the time of the negotiations, it may be that the Juniper Co. would not have acceded to the cancellation, for it might have preferred to retain its rights under the sales agreement, and to ship the amount of lumber for which it was then in default. As a matter of fact it did voluntarily consign three carloads of lumber to the Nelson Co. for sale thereafter, on June 10th. That it considered the sales agreement finally and unconditionally cancelled and abrogated is apparent from the correspondence, and cannot be doubted. It seems almost equally clear that the Nelson Co. at that time took the same view of the cancellation agreement, because there is nothing in the record, except the attorney's letter, from which we have quoted, which in any way suggests that any reservation whatever was then made or contemplated. Notwithstanding the fact that they knew from the correspondence the precise construction which the Juniper Co. placed upon the cancellation agreement, the Nelson Co., did not, by word or sign, indicate that they construed it differently until more than four months thereafter, when, without any previous demand therefor, they sought to recover the amount of damages here claimed. Such a reservation as is here asserted after the cancellation of a contract by mutual agreement cannot rest either upon silence, mental reservation, or equivocal language. It is the agreement to cancel which we must construe—that is, we must determine from the language used, if that is unambiguous,

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what the parties thereto mutually intended to express by that agreement. If the Nelson Co. intended to make this reservation, they should have expressed it and could not do so either by equivocation or by silence. Such a right to sue for past breaches of such a contract which has been thus cancelled by mutual agreement should be found in that agreement, fairly construed, or it cannot be held to exist.

That the view here taken is based upon right reason and justice is well illustrated in this instance, for it may be that if this claim for unliquidated damages for the past breaches of the contract had been asserted, or an effort had been made to reserve the right of action therefor, at the time of the negotiations, the Juniper Co. might have refused to assent to the cancellation of the sales agreement. It might have made some counter proposition, or have preferred to retain its rights thereunder and to repair the breach of its contract by shipping the required quantity of lumber and thereby reduced or discharged its liability. Certainly it seems to us that frankness and fair dealing required the Nelson Co. to assert all of its claims arising under the sales agreement during the negotiations for its cancellation, and that failing to do so, it must thereafter hold its peace. To allow it to recover would be in effect to introduce a new provision in the cancellation contract to which the Juniper Co. has never assented.

We conclude, therefore, that the trial court erred in refusing to set aside this verdict, which it appears to us is contrary to the evidence and unsupported by the evidence.

It further appears, from the admissions in the pleadings, that the Nelson Co. is indebted to the Juniper Co. in the sum of $837.13 for the proceeds of lumber, some of which was shipped before and some after the contract had been cancelled, for which it has never accounted, and therefore the verdict will be set aside, the judgment reversed, and

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judgment entered here in favor of the Juniper Co. against the Nelson Co. for that amount with interest from July 1, 1920.

Reversed.

KELLY *v.* TREHY.

(*Wytheville, June 15, 1922.*)

1. APPEAL AND ERROR.—Bill of Exception—Time for Signing—Time Computed from Date of Judgment—Code, sec. 5, cl. 8, 6252.

Error to Corporation Court of city of Norfolk.

Dismissed.

J. S. Barron and *J. G. Martin,* for the plaintiff in error.

O. L. Shackelford, Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the defendant in error.

BURKS, J.:

This case was heard by the court without the intervention of a jury, and the only error assigned is that the judgment is contrary to the law and the evidence.

There was only one bill of exception in the case, and it is conceded by counsel for the plaintiff in error that the error assigned is dependent upon the validity of this bill of exception.

The judgment complained of was entered on March 29, 1920. The bill of exception was presented to the trial judge for his signature "in the afternoon of May 28, 1920, when court had adjourned, and the judge was about to leave his office," with the request from the plaintiff's counsel that the bill of exception be dated not later than May 29, 1920. The bill was so dated. It does not otherwise appear when it was actually signed, nor does it appear when the court adjourned for the term, except that the trial judge certifies

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that the bill was presented within sixty days after the adjournment of the term. The date of such adjournment is immaterial, as "the sixty days is computed not from the adjournment of the term at which the judgment, by operation of law, becomes final, but from *the date of the judgment* which becomes final by such adjournment." *Bragg* v. *Justis*, 129 Va. 354, 22 Va. App. 298. It is material, therefore, to inquire when the sixty days expired. The facts of this case make it necessary to decide whether the day on which the judgment was rendered is to be counted as one of the sixty days.

Section 5 of the Code is on the subject of the construction of statutes, and after the opening paragraph is composed of twenty clauses. The opening paragraph and clause 8 are as follows:

"Section 5. Rules of Construction.—In the construction of this Code and of all statutes the following rules shall be observed unless such construction would be inconsistent with the manifest intention of the legislature."

"*Eighth, Computation of Time.*—Where a statute requires a notice to be given, or any other act to be done, a certain time before any motion or proceeding, there must be that time exclusive of the day for such motion or proceeding, but the day on which such notice is given or such act is done may be counted as part of the time."

The language of clause 8 is identical with the language of clause 8, sec. 17, chap. 16 of the Code of 1849, and the opening paragraph is substantially the same in both Codes. It will be observed that section 5, Code 1919, applies only "in the construction of this Code and of all statutes." It says nothing about deeds, contracts, wills, or other documents, but is restricted to statutes, and in reference to the latter, it applies to *all statutes*. This rule of construction has been on the statute books of this State, with the brief exception hereinafter noticed, for over three-fourths of a century, and has been repeatedly applied by this court.

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The legislature of 1916, by an act which went into effect June 16, 1916, (Acts 1916, Ch. 290, p. 508), made radical changes in the language of clause 8 of section 5, and extended the rule of construction to contracts, and also made express reference to the time before or after a given date. It also clearly appears that the legislature had in mind two days, an earlier and a later day, between which the computation of time was to be made. The section as changed is as follows:

"8. *Computation of Time.*—Unless otherwise provided by the statute or contract under consideration, the time from or after which or within which an act may be done, or the time before or after a given day, shall be computed by excluding the first day and including the last day of the period." The life of this statute, however, was of short duration as the language of the old section was restored by the Code of 1919, which was enacted in 1918 and went into effect in January, 1920, so that we are remitted to the construction of the old statute.

It is said in the brief for the plaintiff in error that "this subsection does not attempt to treat of acts or notice to be done or given *after* a court proceeding but only before; and no statute requires a bill of exception to be filed a certain time before any proceeding." It was argued that because clause 8 of section 5 uses the word "before" and not the word "after" it has no application to the statute which requires bills of exceptions to be filed within sixty days *after* final judgment, but the argument is not sound. The meaning of the language is the same as if it had declared that the final judgment, which must necessarily have preceded the filing of the bill of exception, must not have been rendered more than sixty days "before" the bill is filed, and such has been the uniform holding of this court.

In *Turnbull* v. *Thompson*, 27 Gratt. (68 Va.) 306, the court had under consideration a statute declaring that no judgment by default on *scire facias* or summons shall be

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valid if it becomes final within one month after the service of such process. The process was served February 3, 1862, and the judgment assailed became final on March 3, 1862, and it was necessary to determine whether or not February 3 was to be counted as one of the days of the month. If it was so counted then the month elapsed before March 3. The court said, "without undertaking now to discuss the doctrine of the common law in respect to the days to be included or excluded in the computation of time under statutes, it is sufficient to say that every difficulty in regard to that question has been removed by the provision of the eighth clause of section 16, chapter 16, page 115, Code of 1860." The section quoted is in the same language of clause 8 of section 5 of the present Code. The court, applying that section to the statute under consideration, held that February 3rd, the day of service of the process, must be counted, and that hence more than one month had elapsed, and that the judgment was valid.

In *Swift* v. *Wood*, 103 Va. 494, the court had under consideration a statute declaring that notice of the motion for judgment for money under section 3211, Code 1904, must be returned within five days after service. The service was made February 21, and the return on February 26. The court again applied the section on the construction of statutes and held that the date of the service should be counted as one of the five days, and that, therefore, the return was not within the time prescribed by the statute.

In *Jennings* v. *Pocahontas Collieries Co.*, 117 Va. 213, 7 Va. App. 227, the court was construing the statute which required the declaration in an action at law to be filed within one month after the process is returned executed. The process was returned executed March 6, 1911, and the declaration was filed April 6, 1911. The contention of the parties is set forth in the opinion of the court in the following language: "The contention of the defendant in error is that the 6th day of March, 1911, should be included as

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the first day on which the month began, and that the month ended with the ending of the fifth of April, 1911. On the other hand the plaintiff in error relies upon clause 8 of section 5 of the Code as sustaining his contention that the statute means within one month *after* the return of the process executed, and within one month *after* the 6th of March, 1911, so that the month in this instance began on the morning of the 7th of March, 1911, and ended on the morning of the 7th of April, 1911, and, therefore, the declaration having been filed on the 6th day of April, 1911, was filed within the time prescribed by the statute." The court considered the question at length and the previous cases on the subject, and applying the section on the construction of statutes, held that March 6th, the day on which the process was returned executed, was to be counted as one of the days of the month, and that consequently the declaration was not filed within one month after the process was returned executed.

In *Anderson* v. *Union Bank,* 117 Va. 1, 10 Va. App. 1, the court was construing the statute which allowed judgment to be taken "after fifteen days notice." The notice was executed June 9, and judgment taken June 24. The court again applied the section on the construction of statutes and held that the day upon which the notice was served was to be counted in computing the fifteen days, and hence that the judgment was valid. Counsel for the plaintiff in error relies upon *Homestead Insurance Co.* v. *Ison,* 110 Va. 18, 3 Va. App. 485, as sustaining the view that the day on which the final judgment is entered is not to be counted as one of the days in computing the time in which bills of exception may be filed. We deem it unnecessary to consider this case as it involved the construction of a contract and not of a statute, and section 5 of the Code is not applicable thereto.

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In *Bull* v. *Evans*, 96 Va. 1, there is a dictum to the effect that in counting the year within which an appeal must be taken to this court, the date of the judgment appealed from is not to be counted. The statute there under consideration forbade an appeal if one year had elapsed "since the date of the judgment" appealed from, but the appeal in that case was held too late on other grounds and there is no discussion of the question, whereas the same court in three out of the four cases above cited discussed the very question now under consideration and carefully considered it and unanimously decided that the first day should be counted. Moreover, not only was the question directly involved and decided after the benefit of all the aid counsel could give them in the other case, but all three of these cases were decided after the decision in *Bull* v. *Evans, supra.*. The language of the statute is the same now as it was when these cases were decided.

Anderson v. *Union Bank, supra,* was decided in January, 1915, and at the next succeeding legislature in 1916 the legislature changed the language of section 5, clause 8, so as to exclude the first date or the day on which the process was served or the act done, but the revisors in their report to the legislature in 1918 restored the old law to the language in force at the time those decisions were rendered and thereby adopted them, and this action of the revisors was approved and adopted by the legislature. Under well settled rules of construction, "when a statute has been construed by the courts and is then re-enacted by the legislature, the construction given to it is presumed to be sanctioned by the legislature and therefore becomes oblgatory upon the courts." *Mangus* v. *McClellan,* 93 Va. 786; *Draper* v. *Comth.,* 132 Va., 25 Va. App. 283, 111 S. E. 471.

It was under the influence of this doctrine that the statement was made by this court in *School Board* v. *Alexander,* 126 Va. 407, 410-11, 19 Va. App. 396. There the final judgment had been entered on the 14th day of February, 1918,

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and the petition for writ of error was presented on the 14th of February, 1919, but at that time the act of 1916, hereinbefore referred to, was in effect. It is there said "under section 5 of the Code (1904) as it stood until the amendment of 1916, February 14, 1918, would have been counted and the motion (to dismiss) would have been sustained. But under the act of 1916, excluding the date of the judgment, February 14, 1918, was not counted and hence the appeal was within time. The court, however, took precaution to call attention to the change made by the revisors of 1919 in the following language: "Attention, however, is called to the fact that at the late revision of the Code the amendment of 1916 was disapproved and the statute restored to its former reading." It will thus be observed that three entirely separate sets of judges have construed the applicability of section 5 in the same manner.

In 7 R. C. L. 1003, it is said: "Even though the conclusiveness of its utterances may perhaps be open to debate, yet when a court of last resort has persistently declared approval of a rule of law, it should not lightly be ignored, especially when in the presence of conflicting decisions in other jurisdictions, such declarations amount to an adoption of the views of these courts approving the rule," citing will of *Hawkinson*, 143 Wis. 136, 126 N. W. 683, 139 Am. St. Rep. 1091, which sustains the statement of the text.

It is to the interest of the public that there should be stability in the laws by which they regulate their conduct. It may be that this court, as at present constituted, would not, as an original proposition, have construed section 5, clause 8 of the Code as it was construed in the cases cited, but the construction of statutes ought not to vary with every change in the personnel of the appellate court. The construction was a fair and reasonable one, made after full deliberation by courts of very able judges, for whose opinion and judgment we entertain the highest respect. Not only so, this construction repeated three times by a unanimous

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court, in each instance, has been approved by the legislature of the State on the recommendation of the revisors who were familiar with it, and cannot now be repudiated by this court.

The statute fixing the time within which bills of exception must be filed is a limitation on the right to file them at all, and a restriction upon the powers of the trial court. The right to file them is given by statute and the failure to file them within the time prescribed by law is not a mere form, but a part of the essence of the right conferred. *Exporters* v. *Butterworth*, 42 Sup. Ct. 331. The failure to file them in time is simply a failure to take advantage of a right conferred, and like other such rights is visited with like penalties. It is always a source of regret that one should lose his rights by a failure to assert them in the time and manner prescribed by law which confers them, but in such matters courts have no discretion.

The remarks of Judge Keith in *Thornton's Case*, 113 Va. 736, 739-40, 6 Va. App. 99, on the present subject, are pertinent here in view of the number of cases that have recently come before us on defective bills of exception. He said: "We regret that this dfficulty is one of such frequent occurrence, and we shall not attempt to fix the responsibility for the omission or further animadvert upon the fact than to say that, while it is a matter of profound regret that such should be the case, we have no choice but to enforce the law as we find it. Those who are not responsible for the administration of justice in accordance with established modes of procedure, easily dispose of such objections by denouncing them as technical, but, while technical, nothing can be of higher importance in the administration of justice than that the record upon which the courts are required to act should be ascertained with certainty and so attested as to leave no doubt of its authenticity, in order that the law pertaining to it may be safely and intelligently declared, and the rights of individuals and of society duly protected."

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A number of cases from other jurisdictions on the subject of the method of computing time have been cited by counsel for the plaintiff in error. It is unnecessary to consider them as we regard the subject as regulated by our own statutes.

Section 6252 of the Code provides that bills of exception may be filed "at any time before final judgment is entered, or within sixty days from the time at which such judgment is entered." In the instant case the judgment was entered March 29, 1920, and the bill of exception was tendered to the judge on May 28, and signed by him on May 29. Counting the day of the judgment as one of the sixty, we have three days in March, thirty days in April and twenty-eight in May, making sixty-one days, so that the sixty days had already expired when the bill was tendered to the judge for his signature.

We have been asked to reconsider our holding in *Bragg* v. *Justis, supra,* especially in view of the fact that the point involved was not argued in that case. It is true that the point was not argued when the case was submitted, but attention of counsel was called to it before the opinion was rendered, and after it was rendered an elaborate petition for rehearing was filed and the rehearing was refused. In the instant case, it is insisted that the sixty days shall be counted from the date of the adjournment of the term at which the judgment was rendered, and the only additional authorities cited are *Winston* v. *Giles,* 27 Gratt. (68 Va.) 537, and *Hudgins* v. *Simon,* 94 Va. 659, but these cases arose when bills of exception could be filed at any time before the adjournment of the term at which final judgment was entered, and are not helpful in construing the language of the present statute. We see no reason to change the holding in *Bragg* v. *Justis, supra.*

The writ of error in this case will be dismissed as improvidently awarded.

Dismissed.

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PRENTIS, J., dissenting.

I respectfully dissent from the conclusions of the majority not because I wish to discredit any of the previous decisions of this court construing other statutes, which are cited in the opinion, but because I think that clause 8 of section 5 of the Code of 1919 does not apply to the statute here involved. That clause, as I read it, refers only to statutes which require a party to give a notice or do some other act a certain time before any motion or proceeding, while section 6252, in express language, allows sixty days from the time at which the judgment is entered within which a bill of exceptions may be signed, and its meaning I think is to allow that period after that day, whereas under the construction here made only fifty-nine days thereafter are allowed. I am confirmed in this view because I believed that heretofore this is the construction which has been placed upon the section by the bar, the trial courts and until recently by this court. *Bull* v. *Evans*, 96 Va. 1, 30 S. E. 458, so construes the statute limiting the time within which appeals to this court may be taken.

MEANLEY v. PETERSBURG, HOPEWELL AND CITY POINT RAILWAY COMPANY.

(*Wytheville, June 15, 1922.*)

1. ELECTRIC RAILWAYS.—Injury to Invitee at Station—Negligence—Contributory Negligence—Safe Place—Reasonable Care—Last Clear Chance.

Error to Circuit Court of Prince George county.

Reversed.

R. E. Byrd, W. L. Duvaney and *Fulton & Wicker*, for the plaintiff in error.

Zimmer & Syme, for the defendant in error.

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PRENTIS, J.:

The plaintiff, Meanley, was struck by a car of the defendant company at Hopewell, instituted his action therefor, and upon the trial there was a verdict and judgment in favor of the company, of which he is here complaining.

The place and circumstances of the injury (in view of the verdict) may be thus described: The company operated an electric railway between Petersburg and Hopewell, and at the Hopewell station its track made a loop around the front (north) and back (south) of its station, upon which its cars turned for the return to Petersburg. The passenger station at Hopewell was near the public road and the approach to the station was from its north side. Before its erection there had been a platform on the same site, and the station was erected over the platform. This left exposed between the rear or south side of the station and the track, a part of the old platform about four feet in width. This space was not intended for or devoted to the accomodation or use of passengers, the way of approach and entrance to the station being on the other, or north, side. At both the eastern and western ends of this space on the south of the station there were signs reading, "Danger! Do not use this space for a walkway," and at the western end thereof, beyond which the passengers were accustomed to board and to alight from the cars, there was a cattle guard, apparently placed there as an additional method of cautioning the public against the use of that space. The movement of the car after discharging its passengers was in front of the north side and around the east side of the station, making a loop and returning to Petersburg by a track on the south side of the station about four or four and a half feet therefrom, but curving in its course in immediate proximity to the planked over space above referred to. Because of this curve in its track, when the car was moving around the rear of and away from the station, the overhang of the car would bring the rear end of it very close

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to the station wall and thus make the space at that time obviously a dangerous place at which to stand.

The plaintiff, who lived at Hopewell, had gone to the station with his sister and her infant child to meet his brother-in-law, who was expected on one of the cars of the company. An unusual number of persons were also there and others were expected because there was to be an assemblage of members of the Shrine on that day at Hopewell. The plaintiff left the waiting room of the station by its front or north door for the purpose of meeting his brother-in-law, and having been informed that he was getting off one of the cars, then walked back across the road until he reached and went upon the planked space located on the south side of the building, to an open window at the rear of the waiting room for the purpose of getting his sister's little boy and returning to the car. While at that window, possibly having his head inside, talking to and expecting his sister to pass the child out to him through the window, he was struck by the rear door of a car passing along the south side of the building on its way to the space assigned for passengers to board the car on the return trip to Petersburg. It is observed that the front of the car had passed him, and it seems to be apparent that if the rear door had not been open the entire car would have passed without injuring him. He testified that no alarm signals were given and that he did not know the car was passing until he was struck.

We do not deem it necessary to discuss all of the questions referred to in the briefs of counsel, because the facts in this case are few and simple, and the questions involved have been so frequently discussed by this and other courts as to make further discussion unnecessary.

That the plaintiff was clearly guilty of negligence contributing to his injury is manifest, and it is likewise clear that the jury by their verdict have so found. The rear window of a railroad station located within about four

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feet of a track upon which railway cars are frequently passing is clearly an improper place to go for the purpose of taking an infant child through the window, or for any other purpose except in some emergency. Such a window as this certainly was not intended as a means of exit from the building.

There is, however, one assignment of error to which we must direct our attention in justice to the plaintiff. The trial court refused to give an instruction offered by the plaintiff, designated as "b," which reads thus:

"The court instructs the jury that even though they believe from the evidence that the plaintiff was guilty of negligence in going upon the platform and standing at the window of the station of the defendant with his back toward the car and railroad track, yet this will not prevent the plaintiff from recovering in this case if the jury shall further believe from the evidence that the motorman in charge of the defendant's car saw, or by the exercise of ordinary care, foresight and precaution in keeping a lookout ahead could have seen that the plaintiff was in danger of being struck by the said car or any part thereof, should said car be run by the place around the curve of the track at the point where the plaintiff was so standing and that the motorman could have warned the plaintiff in time for him to remove himself from such danger, or stopped said car by the exercise of ordinary care and caution in time to have prevented the said car or any part thereof from striking the plaintiff, but failed so to do, then the jury should find for the plaintiff."

This, of course, submits to the jury the question of whether the plaintiff's peril should have been discovered, and whether thereafter the defendant had the last clear chance to save him from the consequences of his own negligence.

That the plaintiff, when he visited the station grounds for the purpose of meeting his brother-in-law, and in mov-

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ing around with those assembled there in the near by public road was an invitee, seems to be perfectly well established, *N. & W. Ry. Co.* v. *Parrish,* 119 Va. 672, 12 Va. App. 345, 89 S. E. 923. As an invitee, however, he should have remained in the place assigned to which the public was invited and where he had a right to be. Having the negligence of the plaintiff in view, the court in its other instructions held the plaintff to be a mere trespasser. We think this is extending that doctrine too far,—that is, we cannot agree that because one goes to an unsafe place at a station which is but a step from a safe place where he has the right to be, that this negligence relieves the transportation company from every obligation except the obligation not to injure him wilfully. It is the duty of such companies at and about railway stations to which people are invited to come, and where they may be constantly expected, to operate its trains there with reasonable care proportioned to the danger which the circumstances create. Under the circumstances of this case, this imposed upon the company not the duty to provide for the absolute safety of persons who were themselves negligent in going to forbiddden places and where they should not have gone, but to move its cars with reasonable care, and this involves exercising a reasonable lookout for persons naturally to be expected to be in that vicinity. *St. Louis & S. F. R. Co.* v. *Jones,* 78 Okla. 204, 190 Pac. 385, 16 A. L. R. 1048. The evidence for the plaintiff tends to show that the car which struck him had been standing still across a public road about 35 or 40 feet away from the place of the injury; that he went to the front of this car and then walked away from it to the window of the station, and that there was nothing to obstruct the view of the motorman as the car approached. Possibly one explanation of the injury is that the motorman was fully occupied looking out for the many other people about there at that time. The theory of the company is that the peril of the

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plaintiff was never discovered by the motorman, but that he moved along with the car to the place at which he was injured so that there was no negligence on the part of the motorman in failing to see him, because he was neither in front of the car nor within the line of the motorman's vision. If this be true there is no liability, and the plaintiff's own negligence is the sole cause of his injury, but if the plaintiff's version is true, then by the exercise of ordinary care the motorman should have seen that the plaintiff had placed himself in a position of extreme danger, and this imposed the further duty of sounding proper alarm signals and doing all in his power to avert the injury. Notwithstanding the gross negligence of the plaintiff, the evidence thus presents an issue of fact which the plaintiff was entitled to have submitted to the jury, and our conclusion is that the court erred in denying him that right.

Every other issue raised in the case has been decided by the jury against the plaintiff under instructions which they could hardly have misunderstood, but this issue has never been submitted. Our judgment, therefore, is to remand the case for a new trial, without reopening all of the issues, but merely for the purpose of determining whether or not, as a fact, the company through its motorman, by the exercise of reasonable care and without the neglect of his other duties, should have perceived the peril of the plaintiff and thereafter, by the exercise of reasonable care could have averted his injury. The burden of proving this fact is upon the plaintiff, like any other fact which is essential to justify a recovery. If he fails to show to the satisfaction of the jury by a preponderance of the evidence that there was this clear opportunity to save him from the consequences of his own negligence, their verdict should be for the company; otherwise for the plaintiff, and if they should find for the plaintiff, they should assess his

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damages at such sum as in their opinion, from the evidence, under the circumstances, will afford fair compensation for the injury.

Reversed.

MONROE & MONROE v. COWNE.

(*Wytheville, June 15, 1922.*)

1. EVIDENCE.—Principal and Agent—Declaration of Agent—Efficiency of Employee.
2. IDEM.—Efficiency of Machine Sold—Efficiency of Similar Machine.
3. IDEM.—Injured Condition of Cows Claimed to be Due to Use of Milking Machine.
4. IDEM.—Return and Acceptance of Similar Machine by Plaintiff—Experience of Another Purchaser with Machine of Different Patent Bought from Defendant—Report of Expert Made to Defendant in Absence of Plaintiff—Hearsay—Opinion of Witness as to Meaning of Warranty.
5. INSTRUCTIONS.—Damages—Evidence.
6. IDEM.—Waiver of Requirement in Warranty as to Notice of Failure of Machine to do Work—Principal and Agent—Authority of Agent.
7. IDEM.—Contracts—Time of Notice.
8. IDEM.—Contracts—Return of Machine Sold—Offer to Return.

Error to Circuit Court of Fauquier county.

Affirmed.

Hyden & Robinson, John S. Barbour and *James R. Caton,* for the plaintiff in error.

Wm. Horgan, for the defendant in error.

This action, of trespass on the case in assumpit, was instituted by W. S. Cowne, the defendant in error, (who will hereinafter be called the plaintiff), to recover of the plaintiff in error, (who will be hereinafter called the defendant), the $500.00 purchase money paid to the defendant by the plaintiff for certain milking machinery,

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consisting of two double unit milkers, a pumping outfit, a 2½ H. P. engine and magneto, piping, etc., (hereinafter called the machine), all to be installed by the defendant for the price of $500.00, and for certain alleged damages claimed to have been suffered by the plaintiff by reason of injury to the udders of his cows, because the machinery, with proper management was not capable of doing good work, all of which was alleged to have been in breach of the erpress warranty upon which the machinery was bought.

The warranty so far as material, was as follows:

"These articles are warranted to be * * * with proper management capable of doing good work, if used as intended. If on starting, any of the above articles should fail to work properly, notice must be given immediately to the *Company at Alexandria, Virginia,* and a reasonable time allowed to get it and remedy the defective part, if any, the purchaser rendering necessary and friendly assistance. When, if it cannot be made to do good work, it will be taken back and all money refunded. Continual possession of the articles, or failure to give notice at once shall be conclusive evidence that they fulfill the warranty."

The verdict of the jury was as follows: "We, the jury, upon the issue joined, find for the plaintiff and assess him damages at $500.00 being the purchase price of the article bought by the plaintiff."

The defendant moved the court to set aside the verdict and to grant it a new trial on the grounds that the verdict was contrary to the law and the evidence, for errors in the admission and exclusion of evidence and in granting and refusing instructions. The court overruled the motion and entered judgment in accordance with the verdict.

The instructions given at the request of the plaintiff were as follows:

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"FIRST.

"The court instructs the jury that if they believe from the evidence that the plaintiff purchased of the defendant the machine in the contract mentioned and agreed to pay as the purchase price therefor the sum of five hundred dollars upon the delivery of the machine, and that at the same time the machine was purchased the contract of purchase with the written warranty thereon was read over to the plaintiff by the defendant's sale agent, and that the said warranty was the inducing cause of the purchase and that the plaintiff relied upon the defendant to carry out and fulfill their said warranty, and that afterwards, pursuant to the provisions of the contract, the machine was sent to the plaintiff at Calverton, Fauquier County, Virginia, c. o. d. and received and paid for by the plaintiff, and that an agent of the company installed said machine in the plaintiff's dairy, and that then, or soon thereafter applied the machine to the cows and started the machine to work, and that two of the cows were injured by the said machine failing to work properly, and the said agent remained or stayed with the plaintiff endeavoring to remedy the trouble, but was unable to do so, and that the plaintiff rendered the necessary and friendly assistance as called for by the warranty, but that notwithstanding the efforts of the said agent in this behalf and the assistance rendered by the plaintiff, the machine failed to do the work properly, and the plaintiff thereafter notified the defendant, or the defendant, already knowing the failure of the machine to work properly, sent other agents to the plaintiff's plant, who also endeavored to make the said machine work and come up to the warranty, and that each time there was an effort to make the machine do the work according to the contract the plaintiff rendered the necessary assistance he agreed to render, and that the machine still failed to fulfill the warranty until some time late in

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the fall of the year 1918, and that said machine could not be made to do good work, when the plaintiff notified the defendant that the machine could not be made to do good work and demanded that it be taken back and his purchase money returned and that the defendant refused to return said purchase money, and that while plaintiff was using said machine on his cows at the suggestion of and relying upon the effort of the defendant and its agents to make the machine come up to the warranty and following instructions of the defendant and its agents in such use, a number of said cows were injured as a result of the use of said machine, then and under the aforesaid conditions the jury should find for the plaintiff for the full amount of the purchase money paid by him, and in addition thereto for such damages as he may have suffered by reason of the injury to said cows, the total, however, not to exceed the sum of two thousand dollars.

"SECOND.

"The court instructs the jury that where in a contract it is provided that notice shall be given the vendor of any breach of warranty, and that continued possession of the article sold, or failure to give such notice, shall be conclusive evidence that they fulfill the warranty, such provisions of the contract or warranty are for the benefit of the vendor, and may be waived by him, and it is for the jury to say from all the facts and circumstances in the case as shown by the evidence whether there has been such waiver by the defendant. But the jury are further instructed that the acts relied on by the plaintiff as constituting a waiver in this case cannot be deemed a waiver where the jury from the evidence find that such acts were done by the defendant in the performance of their contract.

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"THIRD.

"The court further instructs the jury that by the terms 'at once' and 'immediately' as mentioned in the warranty are meant as soon as, under the circumstances, an act can be done; in other words, said terms mean within such reasonable time as shall be required under all the circumstances for the particular case, and as to what is a reasonable time under such circumstances is a question of fact to be determined by the jury.

"FOURTH.

"The court instructs the jury that evidence of the manner in which milking machines of like kind as that sold the plaintiff performed their work is admissible, but they will disregard such evidence as to machines not of like kind."

The court gave all of the instructions asked for by the defendant, with certain amendments, consisting of the additions indicated by the underscoring shown in the reproduction of them below, with the exception of subsection eight of the first instruction offered by the defendant, which is shown below as cancelled, which was wholly refused. These instructions were as follows:

"FIRST.

"The court instructs the jury that the contract in this case is for the sale of known, defined and described articles and there is no warranty, express or implied, of the fitness thereof for any purpose other than as expressly stated therein and the printed warranty annexed to it; that these set out and limit the rights and liabilities of both parties thereto; and the court instructs the jury, as a matter of

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law, that the rights and liabilities of the parties thereunder are as follows:

"First: That it was the duty of the seller, Monroe & Monroe, to deliver the articles therein mentioned and to install the same.

"Second: That the purchaser has a reasonable time thereafter to use and test the same for the purpose of ascertaining whether the articles sold were capable of doing good work when used as intended.

"Third: That the warranty in question was not that said machines would milk plaintiff's cows without injury, under any and all circumstances, but only with proper management it was capable of doing good work when used as intended.

"Fourth: That it was the duty of the purchaser in making such test to see that said machine and appliances were properly managed and manipulated.

"Fifth: That if the machine was incapable of doing good work when so used, the further duty devolved on the plaintiff to give the seller immediate notice of the defect and failure to work and to allow them reasonable time to get to it and remedy such defects, rendering all necessary and friendly assistance in his power.

"Sixth: If the machine could not then be made to do good work, then the sole right of the plaintiff was to return it to the defendant and to have all money previously paid by him refunded.

"Seventh: If the plantiff thereafter retained possession of said machine or failed to give notice at once, he waived his right to return the same or to demand the repayment of the purchase price *unless such notice was waived by defendant as provided in these instructions.*

"Ninth: And even to entitle the plaintiff to return said machinery and to recover the purchase price therefor alone, the burden is on the plaintiff to establish by a pre-

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ponderance of the evidence each of the facts as stated in the next following instruction.

"TWO.

"The court instructs the jury, as a matter of law, that the burden of proof is upon the plaintiff, and it is for him to prove by a preponderance of the evidence:

"First: That the machine mentioned in the contract in evidence in this case did not comply with the warranty attached thereto.

"Second: That immediate notice of such breach was given to the defendant at Alexandria, Va.

"Third: That reasonable opportunity was afforded the defendant by the plaintiff to remedy any defect in said machinery and that friendly assistance was offered and rendered by him to the defendant for that purpose.

"Fourth: That the defendant either made no effort to remedy such defect or attempted to remedy same and failed.

"And Fifth: That the plaintiff thereafter returned *or requested defendant to take back* said machinery to the defendant and demanded repayment of his purchase money.

"Even though the jury may believe from the evidence that said machinery did not comply with said warranty and was incapable of being made to do so, yet if the plaintiff either failed to give notice, at once, to the defendant of such failure, or if the plaintiff continued in the possesson of the articles, either of these facts constitute conclusive evidence of the fulfillment of the warranty *unless the jury believe that these requirements were waived by the defendant,* then the jury should find for the defendant.

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"THREE.

"The jury are instructed that if they believe from the evidence that in the use of the machine it did not work properly or injured plaintiff's cows in its use and that the plaintiff after discovery retained the machine without notice to the defendant of the trouble or continued its use and operation, then the plaintiff cannot recover in this action either the price of the machine or damages to his cows, and they must find for the defendant.

"FOUR.

"The court instructs the jury that under the terms of the contract by which this machine was sold to the plaintiff it was his duty to give the said machine such trial as the contract contemplates, and if it failed to fulfill the warranty *or could not be made to do good work,* to give such notices, *and offer to return the machinery as the contract provides,* and if the jury believes from the evidence that he neglected to give such notice or return the machinery in the manner provided by the contract, but continued to keep and use it even to his own detriment, he is not entitled to any damages and they must find for the defendant, *unless the jury believes that such notice was waived by the defendant, or that such continued use was induced by defendant and intended by it as a waiver of that provision in the warranty made for his benefit.*

"FIVE.

"The jury are further instructed that notice to a mechanic or other person sent to install machinery for the defendants is no sufficient notice of the defendant, under the warranty in this case, unless the plaintiff shows by a preponderance of the evidence that such notice was in fact communicated to the defendant *or acted upon by it.*

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"SIX.

"The court instructs the jury that if they believe from the evidence that the injury to the said cattle was caused by a contagious disease, and that the said cattle were infected by the carelessness and negligence of the said plaintiff, and was not the result of the use of the said machine, then they must find for the defendant.

"SEVEN.

"If the jury believe from the evidence that the milking machine sold to the plaintiff *as installed*, by the defendant, was capable of doing good work with proper management, they must find for the defendant.

"EIGHT.

"The court instructs the jury that under the contract and warranty in this case it was the duty of the plaintiff in testing said machine to see that it was managed properly and as intended. The defendant did not warrant that said machine would not injure weak, diseased or infected cows or could not injure healthy cows if improperly managed or applied, and the defendants cannot be held responsible for results from improper management of the machine by the plaintiff or his agents or to sick, delicate, diseased or injured, infected cows."

The other pertinent matters are stated in the opinion of the court.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court.

The questions raised by the assignments of error will be disposed of in their order as stated below.

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1 }

1. Did the court err in admitting in evidence proof of the declaration of the agent of the defendant, who collected the purchase money for and installed the machine, made while such agent was engaged in the work of installation, concerning the efficiency of one Embrey as an assistant, whom the plaintiff furnished to assist in that work?

The question must be answered in the negative.

The declaration of this agent was made concerning a matter directly within the scope of his employment and while engaged in the performance of his duties, and was, therefore, properly admissible in evidence, if upon a matter in issue in the case. *Lynchburg Tel. Co.* v. *Booker*, 103 Va. 594; *Blair* v. *Security Bank, idem.* 762; *Washington etc. R. Co.* v. *Deahl*, 126 Va. 141, 19 Va. App. 126. The efficiency of the assistance was put directly in issue by the provision on that subject contained in the warranty which was in evidence.

2 }

2. Did the court err in permitting another purchaser from the defendant, of a milking machine, which he said was "a machine just exactly like the one" the plaintiff purchased, to testify as to its efficiency after a thorough trial, under circumstances which he narrated and which tended to show that the machine was properly managed and attempted to be used as intended.

The question must be answered in the negative.

It is apparent that this testimony was pertinent to the chief issue in the case. Its weight was for the jury.

3 }

3. Did the court err in permitting the same witness, last named, to testify as to the injured condition of the udders of certain cows of the plaintiff, which he saw during the time the plaintiff was attempting to use the machine, although the witness did not see the machinery in actual use upon any of those cows?

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The question must be answered in the negative.

The plaintiff introduced other testimony tending to show that the machine was actually used upon the cows in question. A party does not have to prove his whole case by one witness.

4 }

4. Did the court err in permitting the same witness, just referred to, to testify to the fact that the defendant took back the milking machine which witness bought of it, as aforesaid, because it was inefficient, upon the witness paying $35.00 on account of the expense of installation?

The ground of objection to the testimony is that that machine was bought under a contract containing different terms from the contract under which the plaintiff purchased. We do not perceive that such a difference affects the question. The testimony was permissible, for what it was worth, as tending to show the inefficiency of the machine bought by the plaintiff, that being a duplicate of the machine which the witness, in substance, testified proved inefficient.

5. Did the court err in permitting the same witness, when testifying about the trial he gave the machine he bought of the defendant, to testify that he wrote to the defendant about the trouble he was having with the machine because it would not work properly and that a Mr. Lamp came, stating that he was sent by the defendant in response to the letter of witness, and that Mr. Lamp said "it would be all right, he said go ahead * * " that, "he milked a few cows himself with it, he put it on some of them" and told witness to go ahead with the machine?

The objection to this testimony is that the plaintiff introduced no testimony to identify Lamp as an agent of the defendant. But we need not stop to consider that question. The testimony as to what Lamp did and said was favorable, not adverse to the defendant. There is no merit in the objection to the testimony.

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6. Did the court err in excluding from the jury the testimony of one Allen, a witness for the defendant, that his experience with the use of a milking machine bought of the defendant was satisfactory, upon its appearing from the testimony of this witness that the machine he used was made under a different patent, and had a different "pulsator" from that of the machine bought by the plaintiff, and that witness had never used such a machine as the latter and did not know the difference between the pulsators on the two machines?

There is obviously no merit in the assignment of error raising this question.

7. Did the court err in excluding from the jury a portion, and in not allowing evidence of the residue of a statement made to an officer of the defendant company by the expert, Fritz, on his return from installing the machine bought by the plaintiff, by way of a verbal report, not made in the presence of the plaintiff, nor communicated to the latter by any letter from the defendant, or otherwise, prior to the trial, which statement or verbal report of Fritz was to the following effect, namely: That plaintiff would not stay with Fritz while he was giving instructions and operating the machine and that as soon as Fritz left the barn the plantiff would discontinue its use and made no effort personally to operate it. That after some effort Fritz persuaded the plaintiff to try and milk the cows with the machine, and if the first cow showed any inclination for not allowing the machine to be attached on the first trial, the plaintiff would immediately stop and refuse to continue. That plaintiff's man, Embrey, was inclined to operate the machine, and, in Fritz's opinion, would have done so successfully had plaintiff permitted him?

Fritz was not a witness in the case.

This testimony was plainly merely hearsay, not falling within any of the exceptions to the rule against the ad-

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missibility of hearsay evidence. Hence the question must be answered in the negative.

8. Did the court err in refusing to allow one of the officers of the defendant company called as a witness for such company, to answer the following question, namely: "A number of witnesses have testified here as to services rendered by experts in your employ, or in that of the Empire Cream Separator Company, in assisting farmers who purchased your machines in eradicating this disease of mammetis from their herds. Please state whether or not you feel under any obligation to do that, or whether that is a voluntary service?"

The learned judge of the court below ruled that he sustained the objection of the plaintiff to this question, "for the reason that it calls for the expression of opinion from this witness as to what his warranty means." That ruling was correct.

5 }

9. Did the court err in giving instruction 1 asked for by the plaintiff?

This question must be answered in the negative.

The objection to this instruction set forth in the assignments of error concerning it are to the effect that there was no evidence before the jury to support it.

Since the jury found no verdict for any damages except the amount of the purchase money paid for the machine, there is no occasion to consider whether there was any evidence to sustain the instruction with respect to any further damages.

With respect to the other matters embraced in the instruction, we deem it sufficient to say that we have carefully considered the record and we find ample evidence to support the verdict in so far as it was based on the instruction under consideration.

6 }

10. Did the court err in giving instruction 2 asked for by the plaintiff?

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The question must be answered in the negative.

The objection to this instruction set up by the assignments of error are that there was no evidence to show that there was any waiver on the part of the defendant of the requirement in the warranty that the plaintiff should give immediate notice to the defendant *at Alexandria, Virginia*, on the starting of the machine, of its failure to work properly, so that the failure of the plaintiff to give any notice *at Alexandria, Virginia*, of the failure of the machine to do the work as guaranteed, was fatal to the plaintiff's right of recovery.

The general rule undoubtedly is that the contract requirement as to the place, as well as the time and manner of giving such a notice, must be strictly complied with. But such requirement may be waived by the conduct of the seller.

The evidence for the plaintiff was to the effect that before the agent of the defendant, Fritz, who installed the machine, left the plaintiff's premises, immediately after the starting of it, and after various trials of it, Fritz had notice that the machine failed to work properly, with proper management, and so admitted at the time. This notice to the defendant's agent, about a matter within the scope of the agent's employment, given while the agent was engaged in the performance of his duties, while not notice at the place required by the contract, was constructive notice to the defendant. The testimony for the plaintiff is further to the effect that he again notified the defendant that the machine wouldn't work and within four days after Fritz gave up the undertaking to make it work and left the place, Mr. Snyder, another agent of the defendant, being the agent who sold plaintiff the machine, came up to the plaintiff's place, where the machine was, in response to the latter notice. That thereafter plaintiff gave the defendant further notices, that the machine wouldn't work, and that another agent was sent by the defendant to try and get it

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to work properly, without success, and that finally Mr. Monroe, one of the officers of the defendant company, came several times and tried to and did not succeed in getting the machine to operate as guaranteed. It is true that the defendant denied the receipt of the notices mentioned, but the credibility of that denial was for the jury.

As said in 24 R. C. L., sec. 525, p. 247 and sec. 526, p. 248: "The provision for notice being intended for the benefit of the seller, the necessity for giving it or defects in form or method may be waived by him; and the original contract though in writing may be modified by an oral agreement as regards the requirements of notice. Ordinarily any objection on the part of the seller that the notice he received is not in accordance with the requirements of the contract is waived by his acting thereon. Thus persistent efforts on the part of the seller to remedy defects in a machine sold, after the expiration of the time limited for giving such notice of its defective condition, has been held a waiver of the required notice. So where it is clearly shown that notice was in fact given the seller, though the method of conveyance did not follow the requirements of the contract, and no objection to the method used was made by the seller, this will, ordinarily, be deemed a sufficient compliance with the requirement."

* * * * * * * * * *

"Where the seller is a corporation, and can act therefore only through its agent, it cannot divest itself of power to waive a condition for its benefit, and its agents working in its interest will be presumed to have the usual power to waive requirements as to notice."

From which we see that conduct of the seller, such as the testimony for the plaintiff tended to show, consisting of persistent efforts to remedy defects in the machine sold, was sufficient to constitute a waiver of all notice, so that whether any notice was given at all became immaterial.

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The same is true because of the knowledge of the inefficiency of the machine obtained by the agent, Fritz, who installed it, according to the testimony for the plaintiff.

As said in *Peterson* v. *Wood etc. Co.*, 97 Iowa, 148, 59 Am. St. Rep. 399, (involving a warranty requiring a written notice, which was not given); "Every purpose of that provision of the contract had been accomplished by the personal presence of the agent, and the knowledge obtained by him of its operation. Under such circumstances, to have required a written notice was to compel the plaintiff to do a useless act, which would convey to the agent the very information he already possessed. There is no good reason for requiring notice under such circumstances. Nor have we any doubt that an agent authorized to sell such a machine, and to set it up, and to see that it works properly, may waive such a written notice, when, by his personal presence, he is in possession of knowledge of every fact which such notice could give him. It may be said that the contract provides 'no one has any authority to add to, abridge, or change this warranty i any manner.' If full effect should be given to this language, the defendant is powerless to even change or alter its contract, no matter though plaintiff should consent thereto. Such a provision in the contract, if held binding, is a prohibition for all time, and under all circumstaces, against any change in the contract. It is inconceivable that the defendant ever intended to tie its hands in such a manner. A corporation can only act through its agents and such agents must always have power to represent and act for it."

See, to same effect, 30 Am. & Eng. Enc. of Law, (2nd ed.) p. 202.

7 }

11. Was instruction 3 given at the request of the plaintiff erroneous?

The question must be answered in the negative.

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The objection to this instruction is that it ignored the contract requirement as to the time within which the notice was to be given; and a number of authorities are cited to sustain the position of the defendant to the effect that "immediately" does not mean "within a reasonable time," but "at once," "instantly," "promptly," and the authorities cited do so held, under varying circumstances. On the other hand, authorities are cited for the plaintiff to the effect that in such a contract as that under consideration a provision for immediate notice does not mean the shortest time possible in which notice can be given; but that the term must receive a sensible interpretation favorable to the general object and consistent with the surrounding circumstances, and that no greater dispatch is required than is fairly just and reasonable in view of all the circumstances. Upon a subject so elementary, we do not feel that we should consume the time required to set forth here, in detail, the circumstances involved and the respective holdings in the authorities cited pro and con, and to distinguish them. We deem it sufficient to say that they are readily distinguishable, and that the instruction under consideration above is abundantly sustained by the authorities. 5 C. J. 1439, title "at once" note 91; 24 R. C. L., sec. 523, p. 246; 21 Cyc. 1734, title "immediately."

12. Was instruction 4, given as asked by the plaintiff, erroneous?

The question must be answered in the negative.

This instruction was so obviously correct that comment is unnecessary.

13. Did the court err in adding to the 7th subsection of the first instruction offered by the defendant, the following: "unless such notice was waived by defendant as provided in these instructions," and in adding, near the conclusion of the second instruction offered by the defendant, this language: "unless the jury believe that these requirements were waived by the defendant?"

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The question must be answered in the negative.

These were but consequential amendments necessary to harmonize all of the instructions given. The principle involved has been above discussed.

14. Did the court err in striking out the 8th subsection of the first instruction offered by the defendant?

The question must be answered in the negative.

This subsection concerned only the consequential damages mentioned. As the verdict included no such damages it is unnecessary to say anything further on the subject of whether the court erred in striking out this subsection, and the question must be answered in the negative.

8 }

15. Did the court err in adding to subsection 5 of instruction two, offered by the defendant, the following: "or requested the defendant to take back?"

The objection to this amendment is that there was no evidence to support it and that the actual return of the machine was a condition precedent to the plaintiff's right of recovery.

It is true that where, as in the instant case, the warranty contains, in substance, a condition that the article shall be deemed to fulfill the warranty unless returned, the general rule is that if the buyer retains the goods he cannot avail himself of the breach of the warranty, even in an action for damages, unless the goods are worthless for any purpose. 35 Cyc. 436, 438. But it is elementary that an offer to return goods which the seller refuses to accept, is equivalent to a return of the goods and is a sufficient performance of the condition of the warranty on the subject of the return of the goods.

The correspondence in evidence and the testimony of and for the plaintiff shows that the plaintiff very soon after the machine was installed wrote the defendant a letter in which he took the position that the machine did not comply

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with the warranty because of inefficiency to do the work as guaranteed, and said "I would like to know at once what you want me to do with your machine," and the conduct of the parties thereafter; and such evidence, while not without conflict, tended to show, and warranted the jury in concluding that the defendant never at any time, after his first letter aforesaid, changed his attitude, never accepted the machine as satisfactory, wanted all the time to return it and get his money back; that the defendant was fully informed of this and that the conduct of the defendant was such that it amounted to a refusal to accept and excused the failure of the plaintiff to make an actual return of the machine.

Hence the question must be answered in the negative.

16. Did the court err in adding to instructions four, five and seven offered by the defendant, the portions thereof which are underscored in the reproduction of them appearing above, preceding this opinion?

This question must be answered in the negative.

These additions were proper to make the instructions applicable to the evidence in the case; and the most of them were but consequental amendments needful to be made under the rules of law above adverted to, and so as to prevent a conflict between these instructions and those given at the request of the plaintiff. For the reasons above stated, we find nothing in any of these amendments in conflict with the requirements of the warranty or which appears to be of a character likely to have misled the jury on that subject; nor do we think that the insertion of the words "as installed," in the seventh instruction under consideration, was calculated to mislead the jury. The positions with respect to these matters, taken in argument for the defendant, seem to us to be without substantial merit.

The sole remaining question presented for our decision by the assignments of error is the following:

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17. Did the court err in its refusal to set aside the verdict, as contrary to the law and the evidence?

This question must likewise be answered in the negative.

The legal questions involved have been disposed of above; and also the chief question of fact. The other questions of fact are not novel, hence it would be a needless consumption of time to set forth the conflicting evidence in detail. We deem it sufficient to say, that, upon all material matters of fact in controversy, there was testimony in behalf of the plaintiff which, if credible, was sufficient to support the verdict. There was nothing in this testimony which was physically impossible or inherently incredible. Therefore the verdict has concluded the facts in controversy in favor of the plaintiff and we cannot disturb that conclusion.

The case will be affirmed.

Affirmed.

MOORE *v.* KERNACHAN.

(*Wytheville, June 15, 1922.*)

1. APPEAL AND ERROR.—Evidence—Exceptions—Waiver—Exceptions to the Admission of the Evidence which are not Brought to the Attention of the Trial Court at the Hearing and are not Mentioned in the Decrees will be Deemed to have been Waived.
2. WILLS.—Land Set Aside for Payment of Debts—Equity—Conversion—Intent of Testator—Failure of Purpose.

Appeal from the Circuit Court of Mecklenburg county.

Reversed.

Chas. T. Reekes, L. Berkeley Cox and *S. S. P. Patteson*, for the appellants.

Hiram P. Wall and *Irby Turnbull*, for the appellees.

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BURKS, J.:

Mrs. E. A. Moore died in 1915 leaving an estate consisting of household and kitchen furniture, a debt of $600.00 due her by her son, S. T. Moore, and a tract of land containing upwards of 550 acres. She left surviving, six daughters and one son. By her will, dated in 1912, she devised to one of her daughters thirty acres of land, to each of the other daughters fifty acres, and to her son "the house in which I now live and ten acres of land." To two of her daughters she also gave one hundred dollars, each, and to another daughter "balance of money, and notes and bonds." When her will was executed she had neither money, notes nor bonds, but the expectation of estate of that character arising from the sale of land to her son; and at the time of her death she owed no debts except a doctor's bill and a bond of about $1,000.00, principle and interest, secured by a deed of trust on her land, but both the bond and the deed of trust securing it were barred by the act of limitations. This bond was held and owned by one of her daughters who had purchased it in 1898, and no interest had been paid on it after its purchase. This suit was brought by the son suing in his own right and as executor of his mother's will, asking to have the will construed, the land devised to the several devisees set apart to them under the order of the court, his accounts as executor settled and, if need be, a sale of the land set apart for the payment of debts, or that he be allowed to pay said debts and take the land so set apart as residuary devisee under his mother's will, and for general relief. The whole controversy is over the proper construction of clauses one, seven and nine of the will. These clauses are as follows:

"1. It is my wish that all my debts be first paid, for which I leave fifty acres of the best timber land east of the house."

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"7. To my daughter Willie, I leave fifty acres adjoining J. W. Davies land to be cut off by a line running parallel to that of said Davies, also balance of money and notes and bonds."

"9. To my son Samuel I leave the balance of my estate."

The value of the fifty acres set apart for the payment of debts does not appear from the record, but it was stated from the bar, on the oral argument, that the value was probably four or five thousand dollars. It is contended by the daughter, Willie, that, under clause one of the will, the fifty acres of land set apart for the payment of debts was converted out and out into money, and that the surplus after the payment of debts passes to her under clause seven, and the trial court so held, whereas the son contends that there was a conversion only so far as necessary to pay the debts, and that the surplus passes to him as land under clause nine. Both parties state that they wish the debt due their sister paid, although it is barred by statute of limitations, and that whichever one of them gets the land will pay it. Each one asks to be allowed to pay off the debts and take the fifty acres.

1 }

No testimony was given in the case except the deposition of the son, S. T. Moore, which was given April 15, 1920, after the Code of 1919 went into effect. His evidence, if admissible, is sufficient to establish the fact that he was to get the land upon the payment of his mother's debts. There were sundry exceptions taken to questions propounded to the witness during his examination, among them to his competency, because there was no ambiguity in the clause of the will about which he was testifying, because his testimony violated the parol evidence rule, and because some of the questions were leading. But none of these exceptions were brought to the attention of the court at the hearing, and the decrees in the cause make no mention of or reference

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to them. The exceptions must, therefore, be deemed to have been waived. This rule applies as well to exceptions to the competency of a witness as to other exceptions.

In *Stewart* v. *Conrad,* 100 Va. 128, 136, it is said: "Objections were made to the competency of certain witnesses when their depositions were taken, but those objections were not brought to the attention of the circuit court, nor passed upon by it. The objections cannot be considered by this court. A party who objects to the deposition of a witness, if he wishes to rely upon the exceptoin, must bring it to the attention of the court below so it may be passed upon by that court, and, unless the record shows that this has been done, the exception will be treated in the appellate court as waived. *Fant* v. *Miller,* 17 Gratt. 187; *Simmons* v. *Simmons,* 33 Gratt. 461; *Martin* v. *South Salem Co.,* 94 Va. 28, 42." See also *Armstrong* v. *Maryland Coal Co.,* 67 W. Va. 589.

2 }

But, even if the testimony of the son be excluded, the same result would follow. Clause 1 of the will sets aside the fifty acres of land therein mentioned as the primary fund for the payment of debts, and this the testatrix had the right to do; but this could only be accomplished by a sale of the land, or at least some portion thereof. So that there was an equitable conversion of the land at least to the extent necessary to pay the debts.

The doctrine of equitable conversion is a pure creature of equity, unknown to the law, and is a mere incident or application of the maxim that equity treats that as done which ought to be done. Under it, land which is directed to be converted into money is treated as money, and money which is directed to be invested in land is treated as land. As applied to wills, the object is to ascertain the intention of the testator, and whether that intention was a conversion out and out for all purposes, or merely for a particular

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purpose is to be gathered from a consideration of the will as a whole. The general doctrine that a direction to convert will be treated as a conversion, is such a well recognized rule of equity jurisprudence everywhere, that it would be a waste of time and space to discuss it or cite the authorities generally in support of it. In this jurisdiction, see *Harcum* v. *Hudnall*, 14 Gratt. 369; *Ropp* v. *Minor*, 33 Gratt. 97; *Carr* v. *Branch*, 85 Va. 601; *Collins* v. *Doyle*, 119 Va. 63. But while the doctrine itself is well settled, the limitation of its application seems to be equally well settled.

In *Painter* v. *Painter*, 220 Pa. 82, 69 Atl. 323, 20 L. R. A. (N. S.) 117, it is said: "While the doctrine of equitable conversion is well settled on principle and reason and is recognized in numerous cases determined by this court, the sphere or limitation of its application is equally well established and should be observed. The sole purpose of the doctrine in the case of a will being to effectuate the intention of a testator it cannot be invoked when his intention fails or is incapable of accomplishment. The reason of the rule then ceases and the rule itself no longer obtains. This principle is as well settled on reason and authority as the doctrine of equitable conversion itself. It is the logical consequence of the doctrine which cannot be applied unless there is an existing purpose of the testator to be carried into effect. The testator's intention in regard to the disposition of his property as declared in his will, having failed an alternative undisclosed intention cannot take its place, and the doctrine of equitable conversion be invoked to carry it into effect. The court is not at liberty to surmise what the intention of the testator would have been, and what disposition he would have made of his property if he had anticipated the failure of the disposition which he makes in his will. He is dead and no one can speak for him and declare an alternative intent in the disposition of his property. Any other purpose than that named in the will is

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necessarily unknown and the doctrine of equitable conversion cannot be applied to carry out his unknown intention. Hence the necessity for enforcing the rule cited by Mr. Scott, afterwards Lord Eldon, in his argument in the leading English case of *Ackroyd* v. *Smithson,* 1 Bro. Ch. 503, that, the reason of the intention ceasing, the intention should be taken to have ceased."

After a full discussion of the authorities, the conclusions reached is that "It is clear, therefore, that, under all the authorities, when the purpose of the testator as disclosed by his will has failed or is incapable of accomplishment, the operation of the rule of equitable conversion ceases, the property retains its original character, and goes to the heir or next of kin as the case may be."

In 1 Jarman on Wills, (6th ed.) 589, it is said: "Every conversion, however absolute in its terms, will be deemed to be a conversion for the purpose of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between those persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin.

In *Pratt* v. *Taliaferro,* 3 Leigh, 419, 423, Judge Carr, in distinguishing certain cases relied on in the argument, uses this illustration: "Thus, where it is uncertain in what manner the owner intended the property to descend, or where a conversion was directed for a special purpose; or out and out, but the produce to be applied to a particular purpose; when the purpose fails, the intention fails, and equity regards the owner as not having directed a conversion. Thus, in case of lands directed to be sold to *pay the debts of the testator,* if the debts are paid without a sale, it remains land; or if sold, as nothing but the payment of debts was intended, all beyond will remain real estate."

In *Phillips* v. *Ferguson,* 85 Va. 509, 8 S. E. 241, 17 Am. St. Rep. 78, 1 L. R. A. 837, a testator directed a sum of money to be invested in land to be divided between six of

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his children, and provided further that if any one of his children should marry into a certain family that provision should be revoked. One of the children did marry into the prohibited family. It was held that the undisposed of portion of the fund directed to be invested resulted in its unconverted form as personalty to the executors for the residuary legatees other than the daughter whose share was thus revoked.

In *Gallagher* v. *Rowan*, 86 Va. 823, 824, 825, it is said: "The law is that where money is directed by will to be laid out in land, and the purpose of the conversion wholly fails, the fund results in its original form to the personal representative for the next of kin, or the residuary legatee, as the case may be; and the same rule applies where the failure of purpose is only partial. *Phillips* v. *Ferguson*, *supra*, and 3 Pomeroy's Eq. sec. 1172."

It is further said "with respect, however, to the conversion of land into money, the rule, independent of any statute on the subject, is that where the purpose of the conversion wholly fails the land results to the heir. Where the purpose only partially fails the conversion must still be made by selling the land in order to satisfy the purposes which remain effective, and after satisfying those purposes, the surplus, unless the will otherwise directs, results to the heir of the testator as money, and in case of his death will go to his personal representative, even though the sale did not take place until his death."

This is taken largely from 3 Pomeroy's Eq., sec. 1171, where a large number of authorities are cited for the proposition. In the note to that section it is said amongst other things "The main branch of this rule that the surplus results to the heir, was settled by the great case of *Ackroyd* v. *Smithson*, 1 Brown Ch. 503, 1 Lead. Cas. Eq. (4th Am. ed.) 1171, 1181, 1197. The other branch as to

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the form in which it results was first decided by *Smith* v. *Claxton,* 4th Madd. 484," and then follows the list of cases supporting that doctrine.

In *Fifield* v. *Van Wyck,* 94 Va. 557, 27 S. E. 446, 64 Am. Rep. 745, it is said: "It seems to be established by the weight of authority that where a testator directs his real estate to be sold and the mixed fund arising from the proceeds of the realty and personalty to be applied to certain specified purposes, if any part of the disposition fails either because void *ab initio* or by lapse, then, in proportion to the extent or amount which the real estate would have contributed to that disposition the proceeds thereof retain the quality of real estate for the benefit of the heir, although the real estate has in fact been sold."

In *Sweeny* v. *Warren,* 127 N. Y. 426, 24 Am. St. Rep. 468, the executor of a will was directed to sell and convey designated lots of real estate "for the purpose of discharging all my debts." The court said "By this provision the lots mentioned are not converted into money out and out, but the executors are empowered to convert them for a specific purpose, to-wit: the payment of the testator's debts. When a testator authorizes his executors to sell and convert into money all or a part of his realty for a specific purpose, which fails, or is accomplished without a conversion, the power is extinguished and the land cannot be sold by virtue of it or treated as money, but descends to the heir, unless it is devised."

In *Cook's Ex'or* v. *Cook,* 20 N. J. Eq. 375, 377, it was said: "When land for certain purposes is required to be converted into money and in the sale more is sold than is required for that purpose, the excess of the proceeds will be considered as land. *Oberly* v. *Lerch,* 3 C. E. Green, 346.

"In this case the executor was not directed or required to sell except so far as a sale was necessary for the purpose of paying debts, and the legacies directed to be paid. As

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to the rest, it was a mere power which he could exercise or not at his discretion and therefore the land must be considered to have retained its character until the actual sale."

In *Foster's Appeal* 74 Penn. State, 391, 398, it was said by Sharswood, J., "When the purpose of conversion is attained, conversion ends, or more accurately, re-conversion takes place."

In *James* v. *Hanks*, 202, Ill. 114, 66 N. E. 1034, 1036, it is said, amongst other things: "The testatrix, May Ann James, directed her lands to be sold by her executors for the purpose of paying certain gifts to legatees, and not for the purpose of giving the proceeds of the sale of the lands the quality of personalty to all intents. The conversion was, therefore, for the particular purposes of the will and the benefit of the legatees, and the fund produced by the sale cannot be regarded as personalty for the benefit of the husband as the heir at law of the testator. 2 Jarman on Wills, pages 215, 216."

In *in re Sanford's Estate* (Iowa 1919) 175 N. W. 506, the doctrine of equitable conversion is discussed and many cases cited. In that case the personal property amounted to $35,054.00 of which about two-thirds was needed for the payment of debts and costs of administration. There were legacies amounting to $147,800.00. The will contained no positive direction to sell any of the real estate, but there was an imperative necessity to sell it to pay the legacies, and it was held that the intention of the testator to work an equitable conversion of the real estate would be implied, but it was said "There was an equitable conversion, however, only to the extent that the sale of real estate was imperatively necessary to pay the pecuniary legacies and otherwise carry out the intention of the testator. *Duffield* v. *Pike*, 71 Conn. 521, 42 Atl. 641; *McHugh* v. *McCole*, 97 Wis. 166, 72, N. W. 631, 40 L. R. A. 724, 65 Am. St. Rep. 106; *Painter* v. *Painter*, 220 Pa. 82, 69 Atl. 323, 20 L. R. A. (N. S.) 117; *Boyce* v. *Kelso*, 107 Mo. 190, 68 Atl. 550;

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Kolars v. *Brown,* 108 Mich. 60, 121 N. W. 229, 63 Am. St. Rep. 410; *James* v. *Hanks,* 202 Ill. 114, 66 N. E. 1034."

In 6 R. C. L. 1073 it is said "Where an executor sells real estate of his testator to pay his debts, under a power contained in the will, the conversion of the realty into personalty is completed to all intents and purposes only to the extent to which the purchase money is required for the particular objects for which sale takes place; and the excess, though in the form of money, remains impressed with the character of real estate for the purpose of determining who is entitled to receive it." Among the cases cited in support of the text are *Taylor* v. *Crook,* 136 Ala. 354, 34 So. 905, 96 Am. St. Rep. 26; *Kolars* v. *Brown,* 108 Minn. 60, 121 N. W. 229, 133 Am. St. Rep. 410. They have been examined and found to fully support the text. The last mentioned contains quite a full citation of authority from nine different states.

Undoubtedly a testator may direct that his land shall be converted into money, out and out, for all purposes and a court of equity will respect the direction as the testator's will is supreme in the premises, but there is no presumption of such an intent, and its existence must be gathered from the will when read as a whole. *Read* v. *Williams,* 125 N. Y. 560, 21 Am. St. Rep. 748. There are cases where the court have held the conversion complete for all purposes notwithstanding the failure of a particular purpose, but it will be found that such an intention was gathered from the will itself when read as a whole. *Evans Appeal,* 63 Pa. 183; *Hutchinson* v. *Davis,* 68 Ohio St. 160, 67 N. E. 251; *Harrington* v. *Pier,* 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 922, 50 L. R. A. 307; *Lash* v. *Lash,* 209 Ill. 595: cases cited in notes 20 L. R. A. (N. S.) 119. The general rule is that where there has been a total or partial failure of the specific bequest for which the conversion was directed, the conversion will cease altogether or *pro tanto* as the case

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may be. The question has often arisen upon failure of a religious or charitable bequest. In addition to the cases hereinbefore cited, see cases cited in note 5 Am. St. Rep. 146.

In *Hawley* v. *James*, 5 Paige Ch. 318, 444, it is said: "Where the object of the conversion fails, either wholly or in part, whether such failure be occasioned by the incapacity of the devisee or legatee to take or because of the illegality of the disposition attempted to be made of the converted property, or of any particular estate or interest in such property, or from any other cause, there will be a resulting use or trust or estate in the property, or in so much thereof as is not legally or effectually disposed of in favor of those who would have been entitled to such property if the conversion thereof had not been directed by the will."

In *Read* v. *Williams*, 125 N. Y. 748, 752, it was said by Andrews, Chief Justice, speaking for the Court: "A power of sale in a will however peremptory in form, if it can be seen that it was inserted in aid of a particular purpose of the testator, or to accomplish his general scheme of distribution, does not operate as a conversion where the scheme or purpose fails by reason of illegality, lapse or other cause. In that case the property retains its original character and it goes to the heir or next of kin as real estate or personalty, as the case may be. Nothing short of a clear intention to be collected from the will that the land shall be sold and converted into money before division, whether the particular purpose fail or not, will be sufficient in equity to change the character of the property. In England even this is not sufficient to exclude the lien in the absence of an express gift of the proceeds away from him."

In *Painter* v. *Painter*, *supra*, there is an able discussion of the subject. In that case three of the judges dissented, but the dissent was on the application of the rule to the facts of the particular case. The general rule and its quali-

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fication was fully recognized by the dissenting judges in the following language: "The doctrine of equitable conversion is undoubtedly subject to the qualification here expressed, and whether the present case falls within the qualification is the determining question. A conversion directed by a testator is conversion only for the purpose of the will. When the purpose is limited and special the conversion takes place only so far as it may be consistent with and is related to the purpose indicated. It is universally allowed that when the purpose or object of the conversion fails the estate remains uncontroverted to the extent of such failure."

In our research we have found no case of a devise simply for the payment of debts where the conversion was extended to land not needed for the payment of the debts or to a surplus remaining after the payment of the debts.

While it may be true that the personal estate of a testator will not be discharged from the payment of his debts merely because real estate is directed to be sold for that purpose, yet where, as here, it appears that there was specific intention that the real estate should be first applied and there is a gift over of the personal property to another legatee, the intention of the testator will be respected and the real estate held to be the primary fund for the payment of debts. *Sweeney* v. *Warren, supra.*

We are of opinion that clause one of the will constituted the fifty acres of land therein mentioned a primary fund for the payment of the debts of the testator; that so far as necessary for the payment of such debts the said fifty acres was converted into money, but no further; and that the surplus, if any, after the payment of such debts, passed as land under clause nine of the will to the appellant, S. T. Moore. We are further of opinion that the costs of administration are not debts, the payment of which are provided for by clause one of the will. If the appellant, S. T. Moore, shall elect to pay the debts of the testatrix and take the fifty acres of land set apart by clause one of the will he should

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be permitted to do so, without a sale of land. This is simply a re-conversion which he has the right to make. Lile's Notes on Equity Jurisprudence, 29.

The question of the ownership of the rents of land accruing since the death of the testatrix has not yet been passed on by the trial court, and hence is not discussed.

The debt due by the testatrix to her daughter, Mrs. Kernachan, which is confessedly barred by the statute of limitations as against the estate of the testatrix, is not in litigation in this suit. The appellant testified in this suit, to which both he and Mrs. Kernachan are parties, that it was his "intention to pay it with interest up to the time the suit began," whether barred by the statute of limitations or not. Whether or not he could be held liable personally for the debt, under the circumstances, is not before us, and we express no opinion on the subject. Compare *Duiguid* v. *Schoolfield*, 32 Gratt. 803.

The decree of the Circuit Court at its June term, 1920, and December term, 1920, so far as inconsistent with this opinion, will be reversed, and the cause remanded to the said circuit court with directions to conform its decree to this opinion and otherwise proceed in the cause according to law.

Reversed.

McCOY *v.* COMMONWEALTH.

(*Wytheville, June 15, 1922.*)

1. CRIMINAL LAW.—Murder—Manslaughter—Evidence—Jury.
2. IDEM.—Instructions—Reasonable Doubt—Lack of Evidence—Justification of Assault—Grievous Words.

Error to Circuit Court of Dickenson county.

Affirmed.

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Chase & McCoy and *A. A. Skeen,* for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

KELLY, P:

This is a writ of error to a judgment of the Circuit Court of Dickenson county sentencing the defendant, W. H. McCoy, to a term of five years in the penitentiary for the murder of one Dock Johnson.

The case has been tried three times. The first trial resulted in a verdict and judgment sentencing the defendant to a term of fifteen years in the penitentiary. That judgment was reversed for errors not affecting the merits of the present appeal. *McCoy* v. *Commonwealth,* 125 Va. 771. At the second trial the jury failed to agree and was discharged. The third trial resulted in the judgment now under review.

Prior to the killing there had been a serious disagreement between the defendant and the deceased as to which it may be conceded that the latter was chiefly to blame. He had several times grossly insulted the defendant and had cursed him and called him vile names just prior to and perhaps at the time of the homicide. Each had made threats against the other.

The evidence is conflicting as to the circumstances immediately connected with the killing. The case for the prosecution depends largely upon the testimony of a ten year old boy, the only witness except the defendant who saw the fatal shots fired. This boy gave an intelligent and credible account of the affair, and his testimony, viewed in the light of other evidence for the Commonwealth as to the relationship between the principals and the circumstances

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leading up to the tragedy, fully warranted the jury in believing that the defendant was the aggressor, and shot the deceased without legal cause or excuse.

The evidence for the defendant, on the other hand, tended strongly to show that he was anxious to avoid any trouble and shot the deceased in self defense while the latter was attempting to strike him with a black jack.

1 ⟩

Without going further into the details of the evidence at this point, it is sufficient to say that whether the defendant was guilty of any offense, and if so, whether his offense was manslaughter or murder, were, under perfectly well settled rules, questions for the jury to determine. The assignment of error, therefore, based upon the refusal of the court to grant a new trial on the ground that the verdict was contrary to the evidence must be overruled.

2 ⟩

The next assignment to be considered challenges the action of the court in giving, over the defedant's objection, an instruction on "reasonable doubt" as follows: "The court instructs the jury that a reasonable doubt is such a doubt as may be honestly and reasonably entertained as to the offense charged. Reasonable doubt must be based upon the evidence or what is suggested by the evidence or grows out of the evidence itself. It must not be an arbitrary doubt and without evidence to sustain it. It must be serious and substantial in order to warrant an acquittal. It must be of a material fact or facts necessary for the jury to believe to find a verdict of conviction and not of immaterial and non-essential circumstances."

The complaint made of this instruction is that it excluded any reasonable doubt that might arise from the *lack of evidence*. It is undoubtedly true that a reasonable doubt may as well arise from lack of evidence as from evidence which is introduced; and much respectable authority is

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cited in support of the proposition that it is error to give such an instruction as is here under review. We do not regard the instruction as a model. Indeed, we fully agree with counsel for the defendant in their statement that "trial judges are not called upon to define the meaning of the words 'reasonable doubt,' but can safely rely upon the intelligence of jurors to give to plain ordinary words their plain ordinary meaning." Any definition of this expression which might be devised would probably be less illuminating than the expression itself, and would probably be open to criticism. The cases would be very exceptional, however, and this is not one of them, in which an instruction like the one under consideration could mislead the jury. Jurors are presumed to be average men, and the average man would hardly imagine that the court meant to say by such an instruction, even if it stood alone and unaided by any others, that an accused person could be convicted in a case where the evidence was lacking to prove his guilt; and such an unreasonable construction of the court's language would always be placed beyond the pale of possibility by other instructions like those given in this case telling the jury that if they have "any doubt as to the guilt of the accused, or as to any fact necessary to establish his guilt, then they should give the defendant the benefit of the doubt and find him not guilty."

Almost identically the same instruction as that which is here complained of was given in the *McCue Case* and precisely the same objection was urged against it. We may well conclude the discussion of this assignment with the following language of Judge Keith speaking for this court in that case: "The definition of 'reasonable doubt' is attempted by the court. It is a difficult if not an impossible, task to define it * * * but no unbiased person can read these instructions without having the conviction forced

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upon him that every safeguard which the benignity of the law throws around a prisoner upon trial was accorded to the prisoner in this case." 103 Va. 912, 980, 1001-2.

The remaining assignment is based upon the following instruction given for the Commonwealth over the defendant's objection: "The court tells the jury that words howsoever grievous, cannot justify taking life, nor will they reduce the grade of homicide below murder or excuse the same."

At the first trial of this case the court gave an instruction in the following language: "The court further tells the jury that words, however grievous, will not justify an assault." In the opinion above referred to, 125 Va. 771-775, we said that in view of the evidence for the Commonwealth and the other instructions given, there was no error in giving the one last above quoted.

It is insisted that the instruction in the form in which it was given at the last trial was quite different from that in which it was given at the first trial. This is true, but we are not prepared to say that the form in which it was last given was less favorable to the defendant than the form in which it was first given. It would seem to be a necessary conclusion that if grievous words could not be a sufficient provocation for a simple assault, they certainly could not be given that effect in excuse of the higher crime of murder. This consideration alone would seem to be conclusive against the defendant upon the assignment of error here relied on. We shall, however, out of deference to the earnest contention of the learned counsel for the defendant, consider somewhat fully the specific objections which are pointed out to this instruction. These objections are presented under two heads,—first, that the instruction is not applicable to the evidence and is misleading because based upon a partial statement of the evidence, and, second, that the instruction does not correctly state the law.

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As to the first of these objections it is insisted that the defendant did not rely upon grievous words as a provocation, but that his defense was based upon previous threats and a hostile demonstration at the time of the homicide justifying the killing in self defense. In this connection the case is argued upon the theory that the deceased had a black jack in his hand, and was in the act of using it when the shots were fired by the defendant. The evidence was in conflict in this respect, and in view of the testimony of the only eye witness besides the defendant, an entirely possible view was that the deceased did not attempt to make any use of the black jack or any demonstration against the defendant. There is indeed some evidence on behalf of the Commonwealth from which it might be inferred that the deceased did not possess a black jack at all, but we may concede, and think it ought to be conceded under the evidence as a whole, that the deceased did have in his possession such a weapon. We cannot, however, go further and say that the jury ought to have believed that he was in the act of using it when killed. If the version of the affair given by the little boy is to be credited, then the jury might well have believed, and probably did believe, that the weapon, if drawn at all by the deceased, was drawn in an effort to defend himself after the shooting began. Upon this branch of the case, that is, with reference to the question of self defense, the jury was instructed fully, and in a manner which gave the defendant the fullest protection of the rules of law on the subject. But the instruction with reference to the provocation must not be confused with the instructions relating to the question of self defense. It may be entirely true that the theory of the defendant relied upon and emphasized throughout the trial was that he did the shooting in self defense, but it must be remembered that even under the testimony of the Commonwealth, and still more under the testimony of the defendant, the grossly

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insulting language of the deceased to the defendant is conspicuous. These insults were offered not only prior to the killing, but some of them were almost simultaneous therewith. Whether the deceased, before the shooting and in connection with these insults, attacked or attempted to attack the defendant, or did any overt act which would have brought the insult within the character of "adequate provocation" required by law in such cases, was a question which depended upon the credibility of the testimony and the weight given to it by the jury. The court, therefore, very properly told the jury by Commonwealth's instruction four—and it would not have fully and fairly stated the law of the case if it had not told them—"that manslaughter is the intentional killing of one person by another upon sudden heat and upon reasonable provocation without malice." Having done this, it was entirely proper for the court to indicate the character of provocation sufficient to reduce the killing from murder to manslaughter, and given as it was in the abstract, the instruction under consideration in no way ignored the facts relied upon by the defendant, and is not open to the charge that it was misleading because based upon a partial statement of the evidence.

Nor does the instruction, as contended by counsel for the defendant, mistate the law. The overwhelming weight of authority in Virginia and elsewhere sustains the proposition exactly as laid down in the language complained of. The provocation recognized by the law as sufficient to engender the heat of passion, the *furor brevis*, which reduces what would otherwise be murder to manslaughter, requires something more than mere personal insult, however grievous the insult be. There must not only be a sudden heat of passion, but there must be a reasonable, or, as the books perhaps more frequently designate it, adequate provocation. and the law is so tender in its regard for human life that it does not permit a man to defend himself against the charge of murder, especially when he has used a deadly

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weapon and clearly intended to kill, unless his victim has done something more than to merely offer him a verbal insult. This was expressly decided in Virginia in *Read's Case*, and we have not been referred to, and have not found, any authority in this state which in anyway qualifies the following language of Judge Moncure, who delivered the majority opinion of the court: "A reasonable provocation is always necessary to reduce a felonious homicide, committed upon sudden provocation, from the degree of murder (which is its presumed degree), to that of manslaughter; and especially where the offense is committed with a deadly weapon. Words alone, however insulting or contemptuous, are never a sufficient provocation to have that effect, at least where a deadly weapon is used, so tender is the law of human life and so much opposed is it to the use of such a weapon." *Read's Case*, 22 Gratt. 924, 938. Authorities elsewhere are to the same effect with practical unanimity. For example, it is said in 21 Am. & Eng. Enc., page 178, citing a large number of cases, that "in determining whether the provocation in a given case was a sufficient extenuation to reduce the homicide to manslaughter, the nature of the provocation must be considered in relation to the act by which death was caused, and accordingly if the killing was done with a deadly weapon, the provocation must have been very great, involving personal violence to the accused or intent to do him bodily harm." And so again in the same work on page 179, with a vast array of decisions cited in support, it is said: "It has been held in many cases, and the proposition has been reiterated almost as often as it has been raised, that mere words or gestures, however insulting or irritating they may be by reason of their abusive, contemptuous or indecent character, do not constitute adequate provocation in law for such passion or heat of blood as will reduce an intentional homicide from murder to manslaughter."

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It is needless to multiply quotations from the authorities upon this subject, or even to cite any great number of them. In addition to those already cited, we refer only to the following as showing that the principle announced by the court in the instruction under review, as applied to a case like this, is old and well settled. Davis' Cr. Law 84; 21 Cyc. 743; 13 R. C. L. sec. 99.

We find no error in the judgment complained of, and it must be affirmed.

Affirmed.

PORTNER, ET AL., *v.* PORTNER'S EX'RS, ET AL.

(*Wytheville, June 15, 1922.*)

1. WILLS.—Execution—Witnesses—Mental Capacity—Undue Influence—Evidence—Agreement not to Make Will—Character of Witness—Leading Question—Declarations of Testator—Time when Made.
2. APPEAL AND ERROR.—Record—Certification—Certificates of Exception—Time to Sign.

Error to Circuit Court of Prince William county.

Dismissed.

J. L. Costigan, Jno. L. Lee, Thos. H. Lion, and *R. E. Byrd,* for the plaintiffs in error.

H. T. Davies, Eppa Hunton, Jr., and *Jno. S. Barbour,* for the defendants in error.

KELLY, P.:

Paul V. Portner died on the 29th day of October, 1919, leaving a will dated and executed June 2, 1917, whereby he devised and bequeathed practically all of his estate, valued at about $250,000, to trustees for the sole benefit of his sister, Mrs. Etta P. Meredith, for her life, with remainder in fee to her daughter, Sylvia Meredith.

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The testator was about thirty-six years old at the time of his death, and had never married. Surviving him as his heirs and distributees were two brothers, four sisters, and one nephew, son of a deceased brother.

When the will was offered for probate all the heirs and distributees, except Etta P. Meredith, beneficiary as aforesaid, appeared in opposition thereto, and an issue of *devisavit vel non* was submitted to a jury, which, after a trial consuming many days and involving much testimony, returned a verdict sustaining the will. Thereupon the circuit court entered judgment admitting the will to probate, and to that judgment a writ of error was awarded by one of the judges of this court.

The probate of the will was opposed on the grounds, first, that it had not been executed in accordance with the formalities required by the statute, second, that the testator was mentally incapable of making a will, and, third, that he had executed the same as the result of undue influence.

The record presented to us comprises over 1600 printed pages, and the greater part of it is made up of what purports to be the evidence introduced at the trial. If it were feasible it would not be profitable to set out here anything like a full statement of the alleged evidence. It must suffice to say that after having heard the arguments of counsel on both sides of this controversy, and after having read the printed briefs filed in the cause, we have studied the evidence purporting to be shown by the record, and if this evidence were so certified as that we could pass upon it judicially, we would say that the jury was abundantly justified in finding adversely to each of the grounds upon which the will was assailed, and in returning the verdict which is here complained of.

The will was in due form and was attested by three competent witnesses (one more than the statute requires), two of whom testified that the will was both signed and acknowl-

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edged by the testator in the presence of all three of them, and one of whom testified that it was not signed in his presence, but that he did attest the signature. Without going further into the particulars of the testimony in this respect, it is sufficient to say that, if it did not overwhelmingly prove the due execution and acknowledgment of the will, it clearly preponderated to that effect, and fully justified the verdict in that particular.

As to the mental condition of the testator, it is true, and is not denied, that he had been drinking heavily a short time prior to the execution of the will, and was not only suffering from the effect of too much indulgence in this way, but was a sick man, in a hospital, under the care of physicians and nurses when the will was made. But the evidence as presented is such as to leave small room to doubt that at the time he signed and acknowledged the will, he fully understood what he was doing, and that the jury could hardly have been expected to reach a different conclusion. In any possible view of the evidence an appellate court could not properly interfere with the verdict in this respect.

As to the remaining ground upon which the will is assailed, the alleged undue influence over the testator, it is safe to say that evidence upon which to base this contention is almost wholly wanting. The only direct testimony to that effect is a statement by one of the contestants, a sister of the testator, that some time after the will was executed Mrs. Meredith said to her that she "had seen to it" that Paul had made a will. This is denied by Mrs Meredith, and the decided weight of the testimony shows that neither Mrs. Meredith nor her husband even knew that the will was to be made, or that it had been made, until some hours after its execution. It seems that in the afternoon of the day on which the will was executed, the testator showed to Mr. Meredith a copy thereof, and that the latter shortly

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thereafter told his wife about it. Neither Mrs. Meredith nor her husband was present when the will was dictated, or when it was signed, and there is nothing at all in the testimony to indicate that the slightest suggestion was made to the testator by anybody, either that he should make a will, or that he should make it in any particular way. Unless we are to reject positive testimony and indulge in suspicion and conjecture, we must believe from the evidence that on the day before the will was made the testator himself telephoned his own lawyer, procured an interview with him at his apartment in the Bellevue hotel, in Washington, dictated to him the provisions which he desired to have incorporated in the paper, and that on the next day, after the attorney had prepared the will and after the testator had been taken to the hospital, the attorney brought the will there, read it to the testator, who expressed satisfaction with its provisions (and who later, but on the same day, read a carbon copy and again expressed satisfaction with it), and that he thereupon duly signed and acknowledged the paper without aid or suggestion or influence from any source whatever. The original will at his request was retained by his counsel, and a copy thereof was left with the testator, who subsequently placed it in one of his safe deposit boxes in his bank, where it was found more than two years later, just after the testator's death. And it is worthy to note in this connection that in another of his safe deposit boxes were found the only two insurance policies which the testator had, one of which was made payable, in the event of his death, to his sister, Mrs. Meredith, and the other to his niece, Sylvia, the same persons who were named as beneficiaries in the will.

If nothing but the kinship of the parties appeared, it would perhaps seem strange, though it would not in itself prove undue influence or mental incapacity, that the testator gave practically all of his estate to one sister and her

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child; but this disposition of the property is satisfactorily explained in the certificate of the evidence which the appellants have presented to us with this appeal. From what appears in that certificate, the jury would have been well warranted in finding that, while he was an affectionate brother and on good terms with all of his brothers and sisters, he was especially devoted to Mrs. Meredith, and that, in view of this fact and of the manner in which he had always treated her, the provisions of his will were not unnatural.

What has been said would be sufficient (if the record were properly certified) to dispose of the assignment of error based upon the refusal of the court to set aside the verdict as contrary to the evidence, and we shall now advert to the other assignments appearing in the petition for the appeal.

Assignments 1, 2 and 3 are treated under one head in the petition, and we shall deal with them accordingly. They are based upon the refusal of the court to permit the contestants to introduce certain evidence as to the provisions of the will of Robert Portner, the father of the deceased, from whom the latter derived the bulk of the property involved in this litigation, together with certain evidence tending to prove that, after a certain trust clause in the Robert Portner will had through judicial proceedings been annulled, for reasons which need not be recited here, Paul Portner and his brothers had agreed among themselves that neither of them would make a will, so that in case of their death the property they had derived from their father would, notwithstanding the cancellation of the trust clause, pass in practically the same manner to all of their surviving brothers and sisters as it would have done if their father's will had remained in full force and effect. We have given very careful consideration to the question here presented, and find that while some of the rulings

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of the trial court, standing alone, did tend to cut off a development of the terms of the Robert Portner will and proof of the alleged agreement between Paul Portner and his brothers not to make a will, yet the record as a whole, assuming it to be properly before us, shows that the provisions of the Robert Portner will pertinent to this inquiry were all before the jury, that counsel for the appellees during the course of the trial expressly withdrew their objection to any evidence tending to show the agreement between Paul Portner and his brothers, and that the appellants had, or at least were given the opportunity to have, the full benefit for whatever it may have been worth before the jury of their contention that Paul Portner did agree not to make a will in contravention of the general testamentary scheme of his father. Of course, it is not contended that such an agreement on Paul Portner's part could have affected the validity of any will which he might have made in violation thereof. The only ground on which the contestants sought to introduce this proof was that it tended to show that Paul Portner, who was a man of integrity, would not in his right mind have executed a will contrary to such an agreement. The appellants were ultimately given a free hand in submitting this contention, with evidence in support of it, to the jury, and the first three assignments of error, therefore, appear to be without merit.

The next assignment calls in question the action of the trial court in permitting a witness named Rice to testify that one Mrs. Durphy, otherwise known by the name of Bessie Brown, had kept a house of bad fame in Washington under the latter name. The ground upon which it is urged that this testimony ought to have been excluded is that the character of Mrs. Durphy could not be attacked except by evidence concerning her general reputation for truth and veracity, and that her reputation in other respects was not

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relevant. The soundness of the general proposition here invoked may be conceded, but there were several reasons, not involving the character of this witness for truth and veracity, why it was proper for the court to admit the evidence in question. We shall mention only one of these reasons.

Mrs. Durphy testified that she had known Paul Portner well for a good many years, and that on one occasion in April, more than a month prior to the date of the execution of the will, when he was in a hospital in Washington, she had visited him and had taken with her a dog which he had asked her to keep. She further testified that on that occasion when she was about to leave, he begged her to stay, and said to her in substance that he did not want to be left alone at that time because his sister and her husband (without designating them) were, as he feared, coming to the hospital to try to get him to make a will; that she said to him that she would not make a will if she did not want to, and advised him not to do it, and that he replied, "Why, they are after me all the time."

The record as presented to us indicates that at this time there were in the city of Washington several of his sisters and brothers, and that his relations with all of them were most cordial and affectionate. The record further shows, and it is one of the earnest contentions of counsel for the appellants, throughly well supported by the alleged evidence, that Paul Portner, although a dissipated man, had always treated his sisters with the utmost tenderness, respect and affection. In the face of this fact it seems inconceivable that he would have asked a woman of bad character to stay in the hospital in order to protect him against some insistence and coercion which he feared on the part of one of his sisters. No authority is needed for the proposition—it is clear as a matter of reason and justice—that, in testing the credibility of this woman's

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statement as to what transpired between her and Paul Portner on that occasion, the jury ought to have known what sort of a woman she was. That fact would undoubtedly have a bearing upon the reasonableness and probability of her story. We have no doubt that the testimony here objected to did have something to do with the small weight which the jury probably attached to her statements, but that was as it should be. The evidence presented to us shows conclusively that Paul Portner was peculiarly devoted to Mrs. Meredith, and, to say the least, it seems improbable and unreasonable that he would have been willing to insist on keeping this woman in his room at the hospital as a safeguard against the influence which he feared Mrs. Meredith might undertake to bring to bear on him when she came to see him. Mrs. Durphy does not say that she thought Mrs. Meredith was the woman who was coming to try to have the will made; she claims to have thought at the time that it was another sister, but that makes no difference. Paul Portner would have had more respect than this for any of them; and, furthermore, the fact now appears that if what Mrs. Durphy said, and what appellants were trying to prove by her, was true, the woman he was afraid of was in fact his favorite sister, Mrs. Meredith, who is now charged with exercising undue influence over him.

Without referring to other grounds upon which the testimony of the witness Rice might properly have been admitted, we will add that if the objection thereto had been good in the first instance, it was subsequently waived. When Mr. Meredith was on the stand he testified in effect that Mrs. Durphy was one and the same person as Bessie Brown and that she was a woman of bad reputation in Washington. There was no objection to this testimony by him, and if it had been error to admit it in the first place, subsequent introduction of the same evidence without objection con-

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stituted a waiver of the previous objection. *C. & O. Ry. Co.* v. *Greaver*, 110 Va. 350, 354; *Va. & S. W. R. Co.* v. *Bailey*, 103 Va. 205; *Moore Lumber Corporation* v. *Walker*, 110 Va. 775; *Douglas Land Co.* v. *Thayer*, 107 Va. 292, 299.

The next assignment of error is that the court refused to permit the petitioners to prove that the whole estate left by Paul Portner was derived from his father's will, except a small equity in a house and lot. The certificate of exception presenting this question is very meager, and certainly falls short of disclosing reversible error. The witness under examination had already stated, in answer to a question as to whether Paul Portner had received any estate except that which he got from his father's will, that he "had a small equity in a small house and lot." The questions which he was not permitted to answer were: "How did he get that?" and "What was its value?" The certificate shows that after the court refused to allow these questions to be answered, counsel for the appellants said: "That equity was so small that it had no effect on the value of the estate," and indicated that it was not desired to press the inquiry further, and the court said: "I do not think that affects any question at issue in this case." Furthermore, as shown by the certificate of the evidence at large, the jury were fully apprised of the fact that the bulk of the estate involved had been derived by Paul Portner under his father's will.

It is next insisted that the court erred in permitting Miss Hannah Mackzum, one of the attesting witnesses, to be asked and to answer the following questions:

"Q. I hand you the paper purporting to be the will of Mr. Paul V. Portner * * * and ask you if that is the paper you have been referring to in your testimony.

"A. Yes, sir.

"Q. Is that your signature to the attesting clause?

"A. Yes, sir.

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"Q. Please state whether or not the facts stated in that clause are true or not.

A. Yes, sir."

The certificate presenting this question does not state any ground upon which the objection to this testimony was based, but the petition bases it on the ground that the witness was improperly allowed to answer a leading question upon a very material point. The attesting clause, which the witness said contained a true statement of facts, was as follows: "Signed, sealed, published and declared by the above named testator, Paul V. Portner, as and for his last will and testament in our presence, and we, at his request, in his presence and in the presence of each other, have here unto subscribed our names as attesting witnesses, on the day and year last herein above written."

It may be that if the court's attention had been called to the fact that this was a leading question, the objection would have been sustained, and the question required to be put in another form, but even if it had been overruled, the failure to sustain the objection would not have constituted reversible error. It is conceded in the petition, and is, of course, perfectly well settled that the matter of allowing leading questions rests very largely in the discretion of the trial court, and this court will rarely interfere with the action of the lower court merely upon this ground. But the record shows that Miss Mackzum knew and testified as to the condition of the testator at the time of the execution of the will, and, further, that she was quite fully examined as to the circumstances under which the will was signed and attested. Her testimony at large confirms the answer which she gave to the leading question here complained of, and in substance was to the same effect. Plainly no error is shown upon this point.

Over the objection of the contestants, the court permitted the witness Clark Hall to testify that on one occasion, in the

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Bellevue hotel, in Washington, he overheard a conversation between Paul V. Portner and a Miss Brown, a manicurist, in which Miss Brown spoke of one Mr. Dunlap, who had just left the hotel saying that he was going to hurry away and have a change made in his will, and that Miss Brown then said: "Mr. Paul, what are you going to do with your will?" to which he replied: "Why, I am going to leave everything I've got to my sweetheart;" that Miss Brown then asked: "Who is your sweetheart?," and he replied: "It is Mrs. Meredith, my sister. She is the only sweetheart I have got." The certificate of exception indicates that the chief objection to the testimony in question was that the witness ought not to be allowed to detail a statement of the testator as to what he expected to do with his property. In the petition it is urged that there ought to have been some time fixed showing that the declaration in question was reasonably near the execution of the will. It does appear that the witness could not fix the time, but we think this was immaterial. The testimony was admissable regardless of the date. The declaration of the testator in regard to his intention was so interwoven with his expression of affection for his sister as to make it proper evidence. *Coffman* v. *Coffman*, 131 Va., 109 S. E. 454; *Lester* v. *Simpkins*, 117 Va. 55. The remoteness of the time of the declaration from the time of the will would have affected its weight but not its competency as evidence of his regard for his sister. Moreover, it must be remembered that the will was being attacked not only upon the ground of mental incapacity but upon the ground of undue influence, and if this alleged statement to Miss Brown had taken place a long time before the will was executed, it would have been proper to let the jury hear it as tending to show that nothnig that happened about the time the will was made had operated to change his attitude toward Mrs. Meredith.

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The remaining assignments of error, eleven in number, relate to the action of the trial court in giving and refusing instructions. We have hitherto been considering this case as if we could look to what purports to be a certificate of the whole evidence. It must be manifest, however, that none of the several assignments which we have dealt with relating to the admission or exclusion of evidence could have been safely disposed of without a view of the evidence as a whole. This, of course, is peculiarly true with reference to the contention that the verdict was contrary to the evidence. It is equally true in regard to the instructions. As we shall presently see, there is no proper certificate of the evidence in the record, but this is not the only difficulty about the instructions. The certificate purporting to embrace them is so phrased as to make it appear that those offered by the contestants and refused, and the refusal of which is assigned as error, were in fact the instructions granted; and there is no certificate at all which even purports to set forth the instructions given and the giving of which is assigned as error. It is clear enough that this was a mistake, and as to the instructions refused we would perhaps be warranted in holding, and would probably hold, that the contents of the instructions certified demonstrate that they offered by the contestants and that the court necessarily meant to certify them as having been refused instead of as having been given. But there is no certificate of those given, and this, while evidently an oversight, is a legal obstacle to our consideration of even those certified as refused. In the absence of the former we would not say that there was error as to the latter. *Harris* v. *Commonwealth*, decided to-day, and cases cited.

All of the alleged instructions, however, do appear in the transcript of the record presented to us, and we have looked to them with the same degree of care which we have given to the certificate of the evidence, but will not discuss

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them in detail. As is nearly always true where many instrutions are involved, some of the rulings of the court thereon are not free from fair criticism, but we find nothing that we think would constitute reversible error upon a view of them as a whole. If the instructions given and refused had been certified and if the certificate of the evidence before us could be regarded as a part of the record, we would hold that the questions of fact were fairly submitted to the jury.

But, as a matter of fact, there is no certificate of exceptions in this case which we can consider, and we shall be obliged to dismiss the appeal. The final judgment was rendered on the 5th of August, 1920. Not one of the certificates was signed by the trial judge within sixty days from the date. There were twelve of these certificates, the first ten of which related to the rulings of the court upon the evidence and instructions, and the eleventh to the refusal of the court to sign the first ten when presented. The twelfth purports to embrace the evidence in full. Certificates Nos. 1 to 10, inclusive, were presented to the trial judge on October 2, 1920, and, along with No. 11. were signed by him on the 16th of that month. Certificate No. 12 was presented and signed ten days later. The circumstances under which all but number twelve were presented and signed appear from the recitals in number eleven, which is here set out in full.

"Certificate No. 11.

"Certificate to be incorporated as part of the record of the proceedings in the Portner will case pending in the Circuit Court of Prince William county, Va.

"Statement by Mr. Byrd, counsel for contestants:

"On the question of the probate of the will of Paul V. Portner after the court had determined that the judgment

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and verdict should not be set aside, the following certificates were offered to the judge of the court on October 2nd, 1920, at his office in Alexandria, Va.

Certificates Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9 & 10.

"Whereupon, the court refused to consider the bills of exceptions offered by the contestants and refused to sign the same; whereupon the contestants, by Richard E. Byrd, protested and begged that this be made a part of the record so that the same can be presented to the Supreme Court of the State of Virginia.

"Statement by Mr. Barbour:

"As counsel for the executors of the will I object to the signing of the bill of exceptions or any of them because they have never been presented to me and I have had no opportunity to examine them, criticise them, or call to the attention of the court any inaccuracy or insufficiency therein, if any there be.

"Statement by Judge Brent:

"The judge of the court states that Mr. Byrd is mistaken in saying that the court refused to sign the bills of exceptions. The judge stated to Mr. Byrd that he would receive the bills of exceptions after the same had been presented to counsel for the proponents so that they might have an opportunity to examine them and that he would sign all proper bills of exceptions presented to him after that was done as of October 2nd, 1920. The judge never received any notice that this application was to be made to him until Friday, October 1st, 1920, at 4 p. m., which notice was given to him by telegram signed by Mr. Byrd.

"The judge further states that his condition is such that it would be impossible for him to take this matter up before Saturday, October 16th, as court at Prince William county opens on Monday, October 4, 1920, and continues until that

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time, and further that it is physical impossibility for the judge of the court to sign these bills of exceptions at this time owing to the immense record that he would have to review in order to ascertain whether the bills of exceptions are proper or not.

"Statement by Mr. Byrd:

"In reply to the judge of the Circuit Court of Prince William county, the contestants of the will will say that they are perfectly helpless so far as the decisions of the court are concerned, and that the only thing that they can rely upon is the Supreme Court of Appeals of the State of Virginia and Mr. Richard E. Byrd also protests that he has the right as attorney for the contestants to have these bills of exceptions signed which were taken from the record of the court and can be very easily verified. However, as judge of the Prince William Court says that he won't sign anything there is nothing to do but leave to the Supreme Court the decision of the entire question.

"Statement by Mr. Barbour:

"Mr. Barbour, counsel for the executors, states that if permitted to do so he will take the bills of exceptions tendered to-day (October 2nd, 1920), examine them and on October 16th, 1920, be prepared to suggest any amendments which may be proper but without prejudice to his right to object to their then being signed at all.

"Statement by Mr. Byrd:

"Mr. Byrd, counsel for the contestants, came in accordance with notice to the judge of the Prince William county court, State of Virginia, with certain bills of exceptions numbered as above herein set out. whereupon, the judge of the said court said that he would not consider the same and therefore the contestants except and desire this exception to be made a part of their bills of exceptions; that R. E. Byrd came to the city of Alexandria, Virginia, on October 2nd, 1920, with all of the record of the Portner

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will case and offered to the judge of the court that record with the exceptions which the judge refused to consider.

"On October 16, 1920, counsel for proponents and exceptants again appeared before the judge at his offce at Alexandria, Va., pursuant to the postponement above mentioned and counsel for proponent objected to any of the certificates tendered being then signed by the judge, but the said judge ruled that he would sign all proper certificates which had been tendered on October 2, 1920, as aforesaid, and would amend such as needed amendment to make them properly state the facts and thereupon he amends certificate No. 2, 3, 6 and 7 in certain particulars and signed all of said certificates as so amended this 16th day of October, 1920, but as of October 2, 1920, over the objection and excetion of counsel for proponents and this certificate referred to in each of said certificates is intended to be read as a part of each.

"Teste: SAM'L G. BRENT, Judge."

In *Conaway* v. *Commonwealth*, 118 Va. 792, and in *Lancaster* v. *Stokes*, 119 Va. 149, we held that where bills of exception are tendered to the trial judge within the time required by statute and under such circumstances as that upon a refusal to sign them the party making the tender would be entitled to a mandamus compelling the judge to affix his signature, then the bills, though signed after the expiration of the statutory period, will be regarded as a part of the record. In neither of these cases, however, was any question raised as to what would be the effect of delaying the presentation of the bills until so late as that the judge could not reasonably pass upon them before the expiration of the period of limitation. Undoubtedly, it is incumbent upon the trial judge to give prompt and diligent and faithful attention to exceptions tendered within the time prescribed, and if reasonably possible to sign them

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within that time. As held in *Lancaster* v. *Stokes, supra.* it is his duty "to settle questions of dispute between counsel with regard to the evidence, and 'he cannot require counsel to agree upon a statement of the evidence as a condition precedent, nor plead lack of time or memory as justification * * * of refusal to certify the same.'" But this holding, of course, must be given a reasonable interpretation. In no case has this court ever held that the trial judge can be required to act blindly and sign exceptions which he has had no fair opportunity to examine if such a course be necessary to allow his signature within the statutory period. The obvious purpose of the statute is to allow sixty days after final judgment within which counsel may prepare and present, and the court may examine, correct if necessary, and sign the exceptions. The whole time is not given to counsel. Some of it, such as may be under all the circumstances fair and just, belongs to the trial court. He is only required to sign certificates which are substantially correct, and he must have a reasonable opportunity to examine their contents. In some cases this would require only a few minutes. In others, considerably more time might be necessary. Each case will depend on its own circumstances. When concededly correct certificates are tendered in a reasonable time, but not signed because of the illness or death of the judge, the limitation would not apply.

In *Conaway* v. *Commonwealth, supra,* and *Lancaster* v. *Stokes, supra,* it appeared that the exceptors were in no default and had done all they could have been required to do in compliance with the statute. In *Powell* v. *Terry,* 77 Va. 250, and *Dillard & McCorkle* v. *Dunlop,* 83 Va. 755, cited by Judge Whittle in *Lancester* v. *Stokes,* it was held that the trial judge had not exercised due diligence, and had also in other respects committed error in refusing to sign the exceptions.

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In this case, certificates Nos. 1 to 10 were presented to Judge Brent, after notice given him by telegram at 4 o'clock p. m. the day before, on Saturday, October 2nd. The following Monday, October 4th, was the last of the sixty days from the date of the final judgment (*Kelly* v. *Trehy*, decided to-day, and cases cited therein); and a term of Judge Brent's court began on that day. The trial in the instant case had been long, the evidence extensive, and the exceptions presented were numerous. It developed afterwards that some of them were not approved and had to be amended. Under these circumstances, we are not prepared to say that if the judge had, for the reasons stated, refused to sign the exceptions at all, and this were a direct proceeding to compel him by mandamus to affix his signature, we would award the writ. That might depend upon a fuller development of the facts than we now have before us. But we need not decide this question. As already pointed out, a consideration of the evidence introduced at the trial is essential to a determination of the materiality of the questions raised by each of the certificates numbered 1 to 11. These questions are all of such a character as that if the court erred in respect to each of them, the errors might have been rendered harmless by facts developed in the evidence at large; and it is incumbent on the party appealing to affirmatively show reversible error. (*Colbert* v. *Callaham & Sons*, and *Harris* v. *Commonwealth*, both decided today and authorities therein cited).

If, therefore, by an extremely liberal application of the rule announced in the *Conaway* and *Lancaster Cases*, *supra*, we could hold that certificates 1 to 10, which in their original form were tendered on October 2nd and afterwards, with certain amendments, and with certificate No. 11, actually signed on October 16th, should be regarded as having been signed on the former date, the certificate No. 12, purporting to embody all of the evidence, was neither tendered nor signed until October 29th.

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It is true that by certain affidavits of counsel, to whose integrity and veracity we of course accord the highest respect, it appears that they had prepared and tendered and thought they had left with the judge on October 2nd a certificate covering all of the evidence in the case. Upon this latter point, however, the positive certificate of the judge is to the contrary. The affidavits referred to, made in January, 1921, after the record in this case was applied for and certified by the clerk of the lower court, show, among other things, that the statement of Mr. Byrd recited in the certificate No. 11, hereinbefore set out in full, as originally dictated in the presence of the judge on October 2nd, designated 11 instead of 10 certificates, the 11th being the certificate of the evidence, but that before signing what is now certificate 11, the judge at the request of counsel for appellees struck out the figure 11 in Mr. Byrd's statement and made it read "certificates 1, 2, 3, 4, 5, 6, 7, 8, 9 &10" as shown above. This occurrence corroborates Mr. Byrd's recollection and belief that he left the certificate in question with Judge Brent on the 2nd of October but it also shows that the judge did not agree with him upon that point. And the certificate No. 12 sgned on the 29th of October, set out below, is even more emphatic in his particular. We cannot in this collateral proceeding decide a disputed question of fact between court and counsel, but must accept the certificate of the trial court as final. Only in cases where the undisputed facts show that appellants have done all they were required to do, and would therefore be entitled to a mandamus, can we apply the rule announced in the *Conaway* and *Lancaster Cases*, *supra*, and treat irregular bills or certificates of exception as parts of the record without any direct proceeding for that purpose.

The only certificate before us which undertakes to certify all of the evidence was signed on the 29th day of October, 1920, and is as follows:

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"The following evidence on behalf of proponents and of the contestants as hereinafter noted is all the evidence that was introduced on the trial of this cause (here insert stenographic report of the trial of said matter beginning July 19, 1920, and ending August 5, 1920, as taken by Smith & Hules, stenographers, consisting of thirteen volumes numberd two to fourteen, inclusive, beginning with page 33 and concluding 2431, both inclusive, and identified by my initials on the first and last sheet of each volume) except that the original checks, notes, etc., identified by the witness Ratcliffe and listed by his stenographer as exhibits fifty-four to —— were introduced in evidence and are not shown in their entirety by said transcript, and the same is true of the telephone slips identified by the witness, Mary E. Pope.

"It is further certified that the foregoing thirteen volumes of said evidence were produced before me at my office at Alexandria, Virginia, on October 2, 1920, by Mr. R. E. Byrd, of counsel for contestants at the same time that he presented to me the eleven certificates heretofore signed by me on October 16, 1920, as of October 2, 1920, after correction; but there was no certificate presented to me at that time or thereafter in connection therewith, and I was not requested by Mr. Byrd or anyone else to certify the evidence in this case until I was requested to do so on October 26, 1920, by Mr. Lion of counsel for contestants, and no certificate was actually presented to me in connection therewith until to-day, which I have this day siged after amending the same to show the facts as herein stated.

"I further certify that on October 2, 1920, Mr. Byrd, when he left my office took with him all of said volumes of evidence except volume fourteen, which contains the instructions he then asked to have certified though he then offered to leave all of said volumes with me, which I told

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him was unnecessary, and said volumes two to thirteen, inclusive, were not again presented to me until October 26, 1920, when Mr. Lion again presented them to me as aforesaid, and Mr. Lion now states that he then had in his possession a certificate to be signed by me on that day, October 26, 1920, but he did not present the same to me.

"Teste: This 29th day of October, 1920, but done over the protest of counsel for proponents.

"Sam'l. G. Brent, Judge."

This positive certificate by the judge of the trial court leaves us wholly without jurisdiction to consider the exceptions signed by him on the 29th of October. See *Bragg* v. *Justis*, 129 Va. 354, 357. This being true, and all the other exceptions being necessarily dependent for their materiality upon a consideration of the evidence, the appeal must be dismissed. *Colbert* v. *Callaham & Sons, supra.* It is not a matter of discretion or choice, but a question of power which confronts us in this case. In the state of the record before us, we have no more jurisdiction to consider the evidence appearing in certificate No. 12 than we would have if it had never been presented to or signed by the judge at all. *Bragg* v. *Justis, supra; Kelly* v. *Trehy, supra.*

The writ of error is dismissed as having been improvidently awarded.

Dismissed.

PERKINS *v.* DIRECTOR GENERAL OF RAILROADS (A. C. L. R. R.)

(*Wytheville, June 15, 1922.*)

1. RAILROADS.—Injury at Crossing—Duty to Look and Listen—Negligence—Contributory Negligence—Evidence—Code, sec. 6092.

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Error to Hustings Court of city of Petersburg.

Reversed.

R. H. Mann, for the plaintiff in error.
Mann & Townsend, for the defendant in error.

KELLY, P.:

This is an action by Mrs. Hattie E. Perkins against the Director General of Railroads for personal injuries sustained by her in a collision between a horse and buggy which she was driving and one of the Atlantic Coast Line Railroad passenger trains. The jury rendered a verdict for the plaintiff, assessing the damages at $5,000, but the trial court, on motion of the defendant, set the verdict aside, and, pursuant to the provisions of section 6251 of the Code, entered final judgment for the defendant. To that judgment this writ of error was awarded.

The accident occurred in the daytime at a railroad crossing on Hawk street, in the city of Petersburg. To fix the points of the compass approximately, it may be said that at the crossing Hawk street runs east and west and the railroad north and south. The plaintiff was driving west on Hawk street and the train was going north. A few minutes prior to the accident the plaintiff, who was familiar with the situation at the crossing, drove along Hawk street from the east and stopped seventy-six feet from the east rail of the track. From that point she sent her twelve-year-old son, who accompanied her, with a message to her husband, who was on the other side of the track at work in a manufacturing plant. She waited just where she had stopped until the little boy returned, and from that position she could see a train if one should be coming from the south as it emerged from the mouth of a cut to her left about 800 feet in a straight line from her, and about 817 feet south of the crossing. If she had gone any farther west and stopped, unless she had gone so far that the horse's

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head would have been within a few feet of the rails, her view would have been cut off by an intervening bank or hill on the left side of the street. She remained in that position, seventy-six feet from the track, looking and listening all the while for a train, until she saw her son coming back. As he reached the crossing, she called to him to look for a train, and he looked and listened from a point in the center of the track, saw and heard none, and answered, "All right, Mamma." He came on at once, got into the buggy, tucked a lap robe around his feet as a protection against the drizzling rain which was falling, and they then started ahead to make the crossing. The horse was moving in a swift walk, and they continued to look and listen for a train. After passing the bank or hill on her left and at a distance of about thirty feet from the nearest rail, the plaintiff could have seen a train from the south about 400 feet away. The track in that direction from the crossing curved to the left as it ran back to the cut above mentioned, and her view would have gradually extended to the cut as she got nearer the rails. According to her testimony, she continued to look and listen, but neither saw nor heard a train until her horse was about to step on the track. It is not possible to say certainly just where the train was when she first realized its approach. The defendant contends that it was right at her side. A fair view of the evidence as a whole, however, is that it was some distance away. She and several other witnesses, including some introduced by the defendant, testified that she tried to pull the horse back from the track before she was struck, and both she and her son testified that, after they saw the train, she called to him to get out of the buggy; that he did get out after disengaging his feet from the lap robe, and ran back six or seven steps before the accident occurred. It is true that at one point in her testimony she says that the train was right on her when the emergency whistle blew, and that she saw and heard the train all about the same time, but the evidence

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as a whole demonstrates that this part of it cannot be construed literally. The defendant's witness, Grigg, a yard conductor, who saw the accident, testified that the emergency whistle was blown just after the engine "popped around that curve, right at the distance, I suppose, of the switch stand" (the switch stand being several hundred feet from the crossing); and this is not only consistent with a fair interpretation of the testimony of the engineer of the train, but with the undisputed fact that after the plaintiff saw and heard the train, time enough intervened for her to make an effort, observed by many witnesses, to pull the horse back, and for her son to throw off the lap robe, get out of the buggy and run back six or seven steps to the rear before the accident actually happened.

These further material facts, although in some particulars disputed by the defendant, were supported by testimony on behalf of the plaintiff which warranted the jury in believing it to be true.

The whistle was not blown, the bell was not rung, and no other warning of the train's approach was given except the emergency alarm sounded after the engineer saw that the accident was about to happen.

The railroad authorities, although not required to do so by any ordinance of the city, had placed at the crossing an automatic gong intended to warn pedestrians and drivers of vehicles when trains were approaching. This gong was then, and had been for some days, out of order, and it failed to work on this occasion.

There was an ordinance of the city providing that trains should not cross any street at a greater rate of speed than six miles an hour. This train was running at the rate of about forty miles an hour.

The order of the court shows that the verdict was set aside and judgment rendered for the defendant solely on the ground that the finding of the jury was contrary to the evidence and without evidence to support it. We are of opinion that this was error.

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The primary negligence of the defendant is clearly established by the plaintiff's evidence, and all the conflicts in the testimony were settled adversely to the defendant by the verdict. This was fully appreciated and recognized by the learned judge of the trial court, whose written opinion, while not a part of the record, has been furnished to us by counsel. The opinion shows that the decision below was reached on the theory that the plaintiff's "seeing and hearing the train was contemporaneous with the collision," and that her negligence in failing to see and hear sooner than she did was the supervening and proximate cause of the injury. From what has already been said, it will be seen that we do not think this theory is necessarily sustained by the evidence. Upon the contrary, the jury might well have found that the plaintiff's horse was within a few feet of the track before the train could have been seen or heard, and that when the plaintiff did see or hear it, or both, it was still some distance away, though her horse was then just about to step on the track. If her seeing and hearing had been contemporaneous with the collision, there would have been no time for the witnesses to see her, as they did, attempting to pull the horse back from the track, and no time for her to tell the boy to get out and for him to obey and run back several feet, as he undoubtedly did, before the collision occurred. She did not have the right, of course, to go blindly on the track, or to depend entirely on the gong at the crossing, or on signals from the bell and whistle which it was the duty of the defendant's employees to give, or on the slow rate of speed at which the train would have been running if it had obeyed the ordinance. But that the gong might be expected to ring, that it was the duty of the defendant to give warning at the crossing, and that the train ought to have observed a speed of six miles an hour, were circumstances for a jury to consider as bearing very materially upon the question of the care and caution en-

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cumbent upon and exercised by her at the time. As said by Judge Buchanan, in delivering the opinion of this court in *Kimball & Fink* v. *Friend*, 95 Va. 125, 140:

"The erection of gates, gongs, or other devices at highway or street crossings to warn travelers of approaching trains does not excuse a traveler at such crossings from exercising ordinary care and caution. And while courts and text-writers differ as to the degree of reliance that may be placed upon the invitation which an open gate or silent gong gives to the traveler to cross, they generally, if not universally, hold that the same degree of care and caution is not required of him as if there was no such invitation. The question of negligence in such a case is peculiarly one for the consideration of the jury."

The rule as to a silent gong stated in the foregoing quotation applies equally as well to the conduct of a traveler at a crossing where reduced speed and timely warnings are reasonably to be expected. See *Va. Ry. & P. Co.* v. *Oliver*, decided at this term; also *Wilmouth* v. *Southern Ry. Co.*, 125 Va. 511, 520, 18 Va. App. 424.

According to the testimony introduced for the plaintiff, she could first see the track, after passing the hill to her left, when she was within about thirty feet of the crossing. Her horse's head was then some twelve feet or more nearer the track. If, as she testifies, and as may well be true in view of the high speed of the train, it was not then in sight and she continued to look and listen as she proceeded, and saw no train until her horse was too far along for her to stop and get him out of the way, we cannot say that as a matter of law she was guilty of contributory negligence. That was a question for the jury to determine. They did determine it in her favor upon what we regard as sufficient evidence to warrant their verdict, and the plaintiff was entitled to a judgment accordingly.

It should perhaps be added that the defendant failed to comply with section 6092 of the Code, and was thus re-

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stricted to the plaintiff's evidence as to the defense of contributory negligence, and deprived of the benefit of any of its own evidence in that particular. See *Director General* v. *Brown,* decided today. We have not regarded this as a very material point in the case, however, because upon the evidence as a whole, even including that of the defendant, the contributory negligence of the plaintiff appears to have been clearly a question for the jury.

Much reliance was placed by the defendant upon certain photographs introduced in evidence by it. Some of these photographs, with the evidence explaining them, tend strongly to support the defendant's theory of this case. They were taken, however, in the wintertime in the absence of foliage and grass, shown to have materially affected the situation when the accident occurred in June. Moreover, they necessarily depended for their accuracy as to location, distances and other particulars, upon human testimony, and were not entitled to more weight than other evidence for the defendant in conflict with that relied upon by the plaintiff. The credit to be given them as proof had to be settled by the jury. *Spencer* v. *Looney,* 116 Va. 767, 781, 9 Va. App. 474; 3 Jones on Ev., sec. 411, p. 61.

The judgment complained of will be reversed, and this court will enter a final judgment in favor of the palintiff for the amount of the damages fixed in the verdict of the jury.

Reversed.

POWELL *v.* COMMONWEALTH.

(*Wytheville, June 15, 1922.*)

1. CRIMINAL LAW.—Murder—New Trial—After-Discovered Evidence—Perjured Testimony—Provocation—Character of Proof—Affidavit.

Error to Circuit Court of Norfolk county.

Reversed.

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J. L. Broudy and *Jno. W. Happer*, for the plaintiff in error.

Attorney General John R. Saunders, Assistant Attorney General J. D. Hank, Jr., and *Second Assistant Attorney General Leon M. Bazile*, for the Commonwealth.

The accused, Charles D. Powell, was tried for the murder of John E. Wolford. The verdict of the jury found him guilty of murder in the second degree and fixed his punishment at eighteen years in the penitentiary. The judgment under review was entered accordingly.

The accused was convicted upon the testimony of Mrs. Wolford, the widow, and Johnny Burnham, a nephew of the deceased, about eighteen years of age, who were the only eye witnesses of the homicide, other than the accused and his father. The widow and nephew testified as witnesses for the Commonwealth, and their testimony agreed in practically every detail. This testimony was directly in conflict with the testimony of the accused and his father as to the motive and provocation for the shooting of the deceased by the accused. The testimony of Mrs. Wolford, with which the testimony of the nephew concurred, was to the effect that, when the accused and his father, in a buggy, drove up in front of the house of the deceased and stopped, the father called, saying he wanted to see the nephew. That the deceased was then in the back yard cutting down brush with an axe, and called for the nephew, and said: "Some one wants to see Johnny." That the nephew was then sitting in the house and got up and went out towards the father of the accused, who had by that time gotten out of the buggy, leaving the accused sitting in it, and walked up to the yard fence, somewhat to one side of the yard, and began to abuse the boy, and said he wanted to see Wolford, the deceased, and "the whole damn Wolford family." That the nephew turned off and said: "Uncle John, he wants to see you." That the deceased then came from the back yard,

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dragging along the axe he had been using, holding it by the end of the axe handle with his left hand, and went up and stopped inside of the fence within four feet of where the father of the accused was on the outside of the fence, standing against the fence, with a hand on a fence post; the fence being a five-foot, chicken-wire fence between them, the back of the deceased being turned, not directly, but somewhat towards the accused as he sat in the buggy, a short distance away. That, thereupon, the father of the accused began to abuse the deceased, just as he had done the boy. That the deceased did nothing, "only leaned back on the axe as people use * * * (a) cane," "resting on it in place of a walking-stick." That after a few minutes the accused said: "Go ahead, pop—do anything; go ahead, and say anything—any damn thing you get ready, I am with you," and thereupon pulled out a pistol, and, from where he was sitting in the buggy, shot the deceased in the back, whereupon the deceased fell. That witness and the nephew helped the deceased into the house. That witness asked the two Powells to leave, and they drove away together soon after the deceased had gotten in the house. That but one shot was fired, which entered the back of the deceased. That the deceased was taken to a hospital and died that night about 1 o'clock. That the shooting occurred about midday. That the deceased did not lift the axe, as if to strike a blow, before he was shot, but was leaning back on the handle of the axe when he was shot, holding it with his left hand near the end of the handle.

The testimony of the accused and of his father was to the effect that they were going to the blacksmith shop to have some work done on the buggy. That their route was along the road passing the home of the deceased. That as they drew near the house they saw the nephew of the deceased at the shed at the back premises of the deceased. That the father, "feeling a little sick," called to the boy, with the object of getting him to bring him a drink of liquor. That

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the boy acted as if he had hurt his hand, and instead of coming out to the road, walked back of the dwelling house, shaking his hand. That they drove on a little past the front of the dwelling house, when the boy appeared on that side of the house and called to them. That the buggy was then stopped, the father got out to talk quietly to the boy, telling him he wanted a drink. The father testified that he had been accustomed to buying liquor of the boy, had gotten it from him many times—six or eight times—not at this place, but the boy would bring it to him. That, as witness was talking to the boy, the deceased came from behind the house with the axe held about half-way of the handle in one hand. That witness thereupon said to the boy: "Johnny, you have got so peppery out there about the shed I reckon I can do better business with your uncle than I can with you, and you need not come." That the deceased came right up in front of witness, who "told him that he was sick and felt like a little something to drink would do him good," and asked the deceased if he "could accommodate him." On this subject, the further testimony of the father is as follows: "He (the deceased) says: 'I have got nothing like it.' I says, 'John, you say you haven't any?' And he said, 'I have not anything like that, and never have.' I said, 'I know you have been making whiskey. I have been in 100 yards of your still there at the hog pen,' and he said, 'You are a damn liar,' and I said, 'You are another damn liar,' and he come up with his axe and said, 'I will bust your brains out,' and I threw up my hands to defend my head from the axe, and the gun" (pistol) "went off." That when the deceased raised the axe the pistol fired. That the fence at that place was "staked down," so that it was only about a foot high between him and the deceased, and that the two were only about eighteen inches apart at the time the axe was raised and the shooting occurred.

The accused testified that he did not know of any prior difficulty or unfriendly feeling whatever between his father

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and the deceased, and was under the impression that they were on good terms. That nothing was said between the witness and his father about stopping at the home of the deceased until his father saw the nephew of the deceased. Then he heard his father speak to the deceased about a drink as the latter came up to the fence and heard the deceased say "that he didn't have any or had not had any." That "they had several words of that description, * * * and that when Wolford got within a very short distance of my father * * * he told my father he would burst his brains out or something similar." That witness was between twenty and thirty feet away, sitting in the buggy. That the deceased, with the axe, was in striking distance of the father of the witness. That witness was not close enough to have gotten to the deceased in time to have averted the threatened blow with the axe. That, therefore, when he saw the deceased raise the axe and make the threat aforesaid, he shot him to keep him from striking his father. That this was his sole reason for the shooting. That he was on perfectly friendly terms with the deceased. He denied that he and his father had ever discussed with each other the matter of whether or not the deceased had reported to the officers that there was a still on the father's farm, and also denied that he (the accused) went to the house of the deceased the day of the homicide for the purpose of taking that matter up with the deceased. The father of the accused, on being recalled, also made a similar denial.

The accused, in his testimony on the trial, also denied that, in his examination before the judge, on application for bail, when he gave himself into the custody of the judge on the same day as the shooting, he stated that he and his father went down to Wolford's on the day of the homicide to see him about a still, saying that what he did say was the same in substance as that stated in his testimony on the trial, namely, that his father, "spoke to Johnny about some

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whiskey, and this trouble came up when father told them about a still. The still was back of Mr. Wolford's place and pretty close to the hog pen."

Two near neighbors of the deceased, one living diagonally across the road from the dwelling house of the deceased, impeached the testimony of the widow and nephew for the Commonwealth on the subject of the fence being five feet high between the deceased and the father of the accused at the place at which they were when the shooting occurred, and substantially corroborated the testimony of the accused and his father to the effect that it was staken down very low at that place.

In rebuttal, the Commonwealth introduced the deputy clerk, who testified that, on the occasion above referred to, when the accused was being examined before the judge on application for bail, the accused made the statement "that he and his father drove down to Wolford's upon the occasion in question to see him in regard to a still, * * * that he (Wolford) insisted on running a still back there, * * * that accused added, 'You know, your honor, we have had enough trouble about this still business'; that that was the recollection of witness what the conversation was."

Whereupon, the accused introduced his two sisters, who were present on the occasion last referred to of the application for bail, who testified that the accused did not make the statement testified to by the deputy clerk, but, in substance, corroborated the testimony of the accused on that subject.

Thereupon, counsel, who was assisting the attorney for the Commonwealth in the prosecution of the case, stated, in the presence of the jury:

"I will ask that his honor be sworn"—the judge presiding at the trial being the same judge mentioned above to whom the application for bail aforesaid was made.

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Whereupon, the judge said: "I decline to be sworn." Thereupon, the attorney for the Commonwealth said: "I do not join in the request."

No exception on the part of the accused was taken thereto at the time of this occurrence, so far as the record discloses, but it is made the basis of one of the assignments of error.

Upon the return of the verdict above mentioned, the accused, by counsel, moved the court to set it aside on several grounds, of which it is necessary to say only this: None of such grounds included the occurrence last mentioned of the calling upon the presiding judge to be sworn as a witness and his declining to do so, but among the grounds was the following: "Because of newly discovered evidence."

The record shows that no evidence in support of the motion for a new trial, because of after-discovered evidence, was produced before the court at the time of such motion, but that "before the argument on the motion for a new trial be introduced certain affidavits of facts which he could not have discovered by due diligence on his part before his trial, which said affidavits are in the words and figures as follows, to-wit:"

Among these affidavits is one of one of the neighbors of the deceased, who testified as a witness for the accused on the trial on the subject of the heighth of the yard fence at the location where the deceased and the father of the accused were when the homicide occurred, and, omitting the fomal parts, the affidavit is as follows:

"That on the morning of November 25, 1920—the next day after the trial of Charles D. Powell for murder of John E. Wolford, in the Circuit Court of Norfolk county—about eight o'clock A. M., I went to the house of Mrs. Fannie Wolford, widow of the said John E. Wolford, to pay for some corn I had purchased from John Burnham, Mrs. Wolford's nephew, I saw Mrs. Wolford and had some conversation with her. During that conversation I said to her

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that Charlie (meaning Charles D. Powell) got a hard deal yesterday; to which she, Mrs. Fannie Wolford, replied: 'He did not get half enough, and if it had not been for the lies told by Luther Flemming he would have got what he deserved, but we will get the old man, who should have been killed long ago. The old devil has had my niece running over to his place for a year trying to ruin her. If Wolford had got him with that axe he would have got what he ought to have had, and he would have got him if it had not been for Charlie.'

"The above statements were made to me by Mrs. Fannie Wolford."

No affidavit, or other evidence, was introduced in behalf of the Commonwealth to rebut the evidence of the affidavit copied above. The court, however, overruled the motion for a new trial and entered the judgment under review.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

In the view we take of the case, it will be necessary for us to consider only one of the assignments of error, namely:

1. Did the court err in refusing to set aside the verdict and grant a new trial on the ground of the after-discovered evidence disclosed by the affidavit above quoted, which, if true, shows that the testimony of the principal witness for the Commonwealth, on the vital question in the case, of whether there was provocation which justified the shooting, on which the verdict in large part must have been based, was perjured testimony?

This question must be answered in the affirmative.

The general rules governing the subject of granting a new trial are well settled. *Barsa* v. *Kator*, 121 Va. 290, 14 Va. App. 239, and authorities cited. The newly discovered evidence in question meets all of the requirements of these rules, unless it be the requirements of the fifth and last rule, on the subject of what must be the character of the

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newly discovered evidence, namely, that it "must go to the merits of the case and not merely to impeach the character of a former witness." With respect to the meaning of this rule, the following must be borne in mind:

It appears from the decisions on the subject that the newly discovered evidence which is considered as falling within the condemnation of the rule just mentioned is confined to testimony to the bad character of the witness, or which tends to impeach the witness by disproving facts to which he has testified, by means of evidence of other inconsistent facts—*Thompson's Case*, 8 Gratt. (49 Va.) 637; *Brugh* v. *Shanks*, 5 Leigh (32 Va.) 598; *Brown* v. *Speyers*, 20 Gratt. 296; *Read's Case*, 22 Gratt. (63 Va.) 924; *Cody* v. *Conly*, 27 Gratt. (68 Va.) 313; *Gillilan* v. *Ludington*, 6 W. Va. 128, 145; *Slate* v. *Betsale*, 11 W. Va. 703; *Hall* v. *Lyons*, 29 W. Va. 422; *Carden* v. *Bank*, 34 W. Va. 41; *Bloss* v. *Hull*, 27 W. Va. 503; *Levingston* v. *Hubbs*, 3 Johns. Chy. 124—or which consists merely in showing inconsistent statements of the witness made prior to the trial and not under oath (*Shields* v. *State*, 45 Conn. 266; *Arwood* v. *Slate*, 59 Ga. 391), or merely the bias of the witness (*Com.* v. *White*, 5 Mass. 261; *Hammond* v. *Wadhouse*, Idem 353; *Com.* v. *Drew*, 4 Mass. 391; *State* v. *Carr* [N. H.], 53 Am. Dec. 179), and the general rule is that a new trial will not be granted where the newly discovered evidence is of any of the kinds mentioned. This is declared by the authorities to be a rule of policy, intended to secure care and vigilance and prevent parties from coming forward subsequently with evidence which close investigation would disclose at the time; for it is said that a failure of justice in a particular instance is not so great an evil as that there should be no certain end to litigation. 1 Barton's Chy. Pr. 46-7. But where the newly discovered evidence consists of statements of the witness himself unquestionably made and made after the former trial, under circumstances which repel the idea that they are collusive; that is, designed to furnish ground

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for the motion for a new trial, and the statements, if true, are sufficient to show that the verdict was based on mistaken or perjured testimony, a different situation is presented; and the weight of authority seems to be in favor of the view that such evidence does not fall within the category of evidence which falls within the condemnation of the aforesaid rule, but goes to the entire destruction of the evidence on which the verdict was founded, by showing that it was based on mistake or perjury; so that, in reality, because of this, the case has never been tried on its merits, and, hence, such newly discovered evidence goes to the merits of the case; so that in such case a new trial should be granted. And this rule is the same at law upon an application for a new trial before judgment as it is in equity upon a bill filed to obtain a new trial after judgment on the ground of newly discovered evidence showing mistake, fraud or perjury. *Fabrilius* v. *Cock,* 3 Burr. 1771; *Peagram* v. *King* (N. C.), 2 Hawk's, 605; *Gillilan* v. *Ludington, supra* (6 W. Va. 128); *Fletcher* v. *People,* 117 Ill. 184; *Mann* v. *State,* 44 Tex. 642; *Dennis* v. *State,* 2 N. E. 349; *State* v. *Powell,* 98 Pac. 741; *Brussy* v. *State,* 64 S. W. 268; *State* v. *Moberly,* 26 S. W. 364, 20 R. C. L. sec. 80, p. 299, and authorities cited.

Fabrilius v. *Cock, supra* (3 Burr. 1771), was an action of trover, in which a verdict had been given for the plaintiff for 2,400 pounds, at *nisi prius,* before Lord Mansfield. The defendant moved for a new trial, upon the ground "that the whole was a fiction, supported by perjury, which he could not be prepared to answer. That since the trial many circumstances had been discovered to detect the iniquity and to show the subordination of the witnesses." The report of the case states that the court, "after a very strict scrutiny, * * * granted a new trial." This action of the court was affirmed by the Court of King's Bench.

In *Peagram* v. *King, supra* (2 Hawks 605), a bill in equity was filed, seeking a new trial of an action at law, in which

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the verdict was based on the testimony of a witness, Jenks, who, subsequently to the trial, during his last illness, confessed that he perjured himself in the testimony given by him on the trial, being incited thereto by the promise of a bribe from the defendant. The court, in the course of the opinion, says: "It is in general true, both at law and in equity, that a new trial will not be granted on the ground of newly discovered evidence, which goes utterly to destroy the former testimony and cut it up by the root, by showing that it was founded in perjury. Accordingly, both courts furnish instances of a new trial being granted for the latter cause." After citing cases, the opinion continues as follows: "No evidence could have been given of the dying declarations of Jenks, wrung from him in an agony of remorse, when he had no motive to misrepresent * * *. It is admitted (Prec. in Chan. 193) that if a witness, on whose testimony a verdict has been given, was convicted of perjury, a new trial may be granted. The death of Jenks, before the complainant knew by what witness his declaration could be shown, rendered a prosecution impossible, and brings the case within the reason of the decision." The court decided "that a new trial be had in the court whence the case at law came * * *."

In 20 R. C. L., *supra* (sec. 80, p. 299), this is said: "Where there is no reason to suspect certain testimony to be perjured, and no laches is shown, the courts will generally grant a new trial, if, after the trial, evidence of its perjured character is discovered, and it is as to a material issue, or the verdict is based principally on such testimony. Thus, where a material witness admits under oath that his testimony was mistaken or false, a new trial has in a number of cases been granted."

It is true that courts of the highest authority have taken the view, at least in civil cases, that a judgment or decree, although obtained by false swearing, will not be set aside unless the fraud is extrinsic or collateral to the matter tried

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by the first court. See *McClung* v. *Folks,* 126 Va. 259, 19 Va. App. 295, and authorities cited. What is fraud extrinsic or collateral was thus defined by the court below in the case of *United States* v. *Throckmorton,* 98 U. S. 61, 25 L. Ed. 93: "Keeping the adversary's witness from court; secreting or purloining his testimony; or any conduct of the kind mentioned (which) would tend to prevent a fair trial on the merits, and thus to deprive the innocent party of his rights. So, if a judge sits, when disqualified from interest or consanguinity; if the litigation be collusive; if the parties be fictitious; if real parties affected are falsely stated to be before the court." This definition is, in substance, approved by the holding of the Supreme Court in the case, as set forth in the learned and instructive opinion delivered by Mr. Justice Miller. It would seem, however, that the doctrine of intrinsic and extrinsic fraud is, after all, not much, if at all, different from the rule of policy above referred to, which refuses a new trial on the ground of after-discovered evidence, where the evidence is of the character mentioned above as falling within the condemnation of the character of the fifth rule on the subject of granting of new trials on the ground of after-discovered evidence, other than proof of perjury or mistake, where such proof has come into existence after the former trial. The latter character of proof tends to show that no fair trial on the merits has been had. It is matter not suspected to have existed, and so impossible to have been considered or to have been "matter tried by the first court" which the courts have in mind which adhere to the intrinsic and extrinsic fraud doctrine. (See opinions of Chief Justice Shaw in the leading case on the latter subject of *Greene* v. *Greene* (Mass.), 2 Gray 361.) Hence, the granting of a new trial on the ground of proof of perjury or mistake, where the evidence of it has come into existence since the former trial, and appears to be true, not to be collusive, and

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ought, if true, to produce a different verdict on a new trial, does not volate the doctrine just mentioned.

It is further true, however, that even within the narrow limits of the class of cases in which, by the weight of authority, a new trial should be granted for after-discovered evidence of mistake or perjury, the courts act with great reluctance and with special care and caution. The courts properly require that it shall be made to appear affirmatively that the new evidence tending to show the mistake or the perjury, beyond question exists and is not a mere matter of belief or opinion, before they will grant the relief in such cases. Where the ground is perjury, the old rule was that the witness must appear of record to have been convicted of the perjury or his death must have rendered conviction impossible, before it could be regarded as good ground for the new trial. 20 R. C. L., sec. 80, p. 300. The modern rule is not so strict. By the preponderance of authority it seems to be sufficient if the court has evidence before it which establishes the existence of the evidence relied on to show the perjury or mistake, in such a clear and convincing manner as to leave no room for doubt as to the existence of the evidence so relied on, and the court is satisfied that the evidence is not collusive, that it seems to be true, and ought, if true, to produce on another trial an opposite result on the merits.

In the case in judgment, the evidence in support of the motion for a new trial consists of the statement of the witness on the former trial contained in the affidavit of an apparently reliable and disinterested person. The attorney for the Commonwealth introduced no counter-affidavit, or other evidence, to controvert the truth of the affidavit. That being so, we must hold, on the case as presented to us that the statement contained in the affidavit is true.

As held in *Piper* v. *State, supra* (124 S. W. 661): "Where the affidavit in support of the motion for a new trial on the ground of newly discovered evidence, averred

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facts with great particularity, so that the State could easily meet it had the facts been untrue, and there was no attempt by the State to meet it, the court, on appeal, will presume that the matters are correctly stated in the affidavit." The same is true in the instant case.

The material fact stated in the affidavit aforesaid is that the widow of the deceased, the day after the trial which resulted in the conviction of the accused, made a statement which bears internal evidence that it was not collusive—that is, was not made to serve as the ground for a new trial of the accused—in which she said, in substance, that the father of the accused would have been struck by the deceased with the axe and thereby killed or received great bodily harm but for the shooting of the deceased by the accused; that is to say, that the shooting was done by the accused in the necessary defense of his father, and in order to save him from becoming the victim of a felony about to be committed by the deceased which was imminent and evidenced unmistakably by an overt act. This is in direct conflict with the testimony of this witness on the trial. And as, upon the record before us, we must regard it as true that she made this statement, we are forced to the conclusion that the testimony on the trial of the witness in question, upon this vital feature of the case, appears to have been willfully false.

It is true that there was before the jury the testimony for the Commonwealth of the boy, the nephew of the deceased, to the same effect as the testimony of the widow, on which the verdict might have been found. And the general rule is that if, eliminating the perjured evidence, there is still other evidence sufficient to support the verdict, a new trial will not be granted. 20 R. C. L., sec. 80, p. 300. But that is where the court can fairly conclude that the jury in such case would have come to the same conclusion had the perjured testimony been eliminated. We are unable to reach that conclusion in the case in judgment. On account of

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their relationship, their association and their comparative ages, we cannot feel that the testimony of the boy was wholly uninfluenced by that of the widow. And in view of the statement of the latter, disclosed in the affidavit aforesaid, the case is one in which the newly discovered evidence indicates the existence of a purpose on the part of the widow to procure the conviction of the accused upon fabricated evidence. This, if true, ought to produce on another trial an opposite result on the merits, and brings the case within the principle of the holding of this court in *Johnson's Case*, 104 Va. 881.

In the case just cited, the newly discovered evidence concerned, indeed, facts of which evidence existed prior to the trial, some of which the accused, by the exercise of due diligence, might have discovered prior to the trial, as appears from the evidence itself, the affidavit of the accused to the contrary notwithstanding. And that case is regarded as an exception to the general rule in that feature of it. Burks' Pl. & Pr. (new ed.), p. 556. As said, however, on the same page of the valuable work just cited: "Applications for new trials are addressed to the sound discretion of the court, and are based on the ground that there has not been a fair trial on the merits." And, after stating what is said to be the general rule on the subject, the same authority adds this: "Exceptional cases may arise when the courts will find it necessary to depart from it." The authorities generally agree with this view. But in granting a new trial upon the ground that the newly discovered evidence, if true, indicated a purpose on the part of a principal witness for the Commonwealth "to compass the conviction of the accused upon fabricated evidence (which newly discovered evidence) would reasonably have exerted a favorable influence with the jury in his behalf," as was done in that case, we believe that the ruling was not an exception to, but was in accord with, the weight of authority on the subject.

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A new trial will, therefore, be granted.

We will add, however, that what we have said above must not be understood as deciding that the witness in question did in fact make the statement contained in the affidavit aforesaid, or, if she did, that she may not be able to give some satisfactory explanation of it consistent with the veracity of whatever may be her testimony on the new trial; nor that a jury may not be warranted in convicting the accused upon the the other testimony in the case, with that of the widow eliminated, if such should be the situation upon a new trial. The whole subject will be at large and open to full investigation upon a new trial, and what we have said in this opinion as to the credibility of the testimony should not be stated before or allowed in any way to affect the jury upon the new trial.

Reversed, and a new trial granted.

REYNOLDS v. COMMONWEALTH.

(Wytheville, June 15, 1922.)

1. CRIMINAL LAW.—Venire Facias—Motion to Quash—Irregularities—Code, sec. 4896.
2. IDEM.—Instructions—Self-Defense—Absence of Malice—Provocation—Voluntary and Involuntary Manslaughter.
3. IDEM.—Argument of Attorney for the Commonwealth.

Error to Circuit Court of Patrick county.

Affirmed.

W. L. Joyce, Hooker & Hooker and *S. A. Thompson,* for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

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KELLY, P.:

A. T. Reynolds, upon an indictment for the murder of his son, Alvis J. Reynolds, was found guilty of that crime in the second degree, and sentenced to the penitentiary for a term of eight years.

The evidence in the case upon some of the material points is conflicting, but, from the standpoint of the Commonwealth and as supporting the verdict, justifies the following statement:

The killing occurred on Sunday afternoon, December 19, 1920. The deceased, Alvis Reynolds, a man of about thirty years of age, lived at Danville, and had come to his father's home for a visit. On the day of the tragedy a number of persons were at the Reynolds home, most of them, including the accused and the deceased, were drinking. After dinner four of the party, the accused, the deceased, Arthur Reynolds, another son, and Joe Penn, a nephew of the accused, left the house and engaged in a game of cards in the open air near the corn crib. Others of the party, including Edgar Reynolds, the eldest son of the accused, were present watching the game. Some dispute arose among the players, and the accused said he was going to quit. At the juncture Edgar Reynolds mildly remonstrated with his father, telling him not to quit and that the game was going all right. This offended the accused, although it ought not to have done so, and resulted in some angry words between the two for which he was chiefly if not wholly to blame. Finally, in response to a remark which he had provoked from Edgar, he said: "You won't come up to the house and tell me that." After throwing out this challenge, he immediately went to the house, placed a pistol in the right hand pocket of his trousers, and came back. In the meantime Edgar had taken his father's place in the game. On his return, the accused stood or walked around the party for a short time, keeping his right hand in his pocket and looking at the crowd angrily. He said

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nothing, however, and in a short time went to the stable near by to water his mules. After taking one mule to the creek and returning to the stable, he led two others out to take them to water. Having some difficulty in leading them, he picked up a wagon standard with which he severely beat one of them over the head. The other mule got away, and the accused then rode the one he had been beating down to the creek. About that time the deceased, Alvis Reynolds, who with the other players had seen the accused beating the mule, said: "Boys, I am going down to the creek and tell pap not to whip the mules any more. They haven't done anything to be whipped for," or words to that effect. Suiting the action to the word, the deceased went down to the creek where the accused was sitting on the mule. The deceased raised his hand as if talking to the accused, and said: "Pap, you have got to quit beating these mules. They haven't done anything to be beat for and I won't stand for your beating them." Thereupon the accused immediately drew his pistol and fired the fatal shot. He then rode back towards the stable, pistol in hand, and was met by Edgar Reynolds, who said: "I am going to arrest you, pap. You have shot my brother." The accused replied: "Yes, and by G—— I have just killed one d—n s— of a b—, and will put another in the same fix." A struggle ensued in which Edgar, with the aid of two other men and the wife of the accused, succeeded in overcoming him and getting the pistol out of his hands. In the struggle he fell or was pulled from the mule, and was held down on the ground by Edgar, whom he tried to shoot several times before he was subdued and compelled to give up the pistol.

The accused testified that the deceased, when he came to the creek, picked up a rock, and that an altercation occurred between them in which he, the accused, endeavored to avoid the difficulty, and shot in self-defense after the deceased had not only threatened to beat him to death but

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had taken the mule by the bridle with one hand, and had struck him in the side with the rock which he still held in the other hand.

We need not go into more detail as to the evidence. It is sufficient to say that it abundantly supported the verdict, and that, therefore, we cannot interfere with the judgment unless we shall find some error in the rulings of the court in respect to matters other than the sufficiency of the evidence.

1 }

The first assignment of error relates to the validity of the *venire facias*.

After two postponements during the term, the case finally came to trial on May 23, 1921. Both the Commonwealth and the defendant having answered ready, the defendant "craved *oyer* of the original list of veniremen drawn for this term of the court, and the original writ of *venire facias* for this term, and all additional writs of *venire facias* summoning veniremen to appear at this term, and when the same were presented moved to quash the same."

The order of the court merely shows that this motion to quash was based "on the ground of various irregularities in connection therewith." We have not been shown and have not found any reason why the court might not regularly and safely have proceeded to select the jury from persons already summoned under the original writ supplemented by the alias which had been issued in the instant case; but the motion was sustained and all the writs were quashed. This left the court without a panel of jurymen, and proceeding upon its own motion it ordered a new *venire facias* directing the sheriff to summon from a list of twenty-four names furnished by the judge twenty persons as jurors for the trial of the case. There had been, under the original and various alias writs of *venire facias* which were quashed, a total of fifty-nine jurymen summoned at

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that term. The names on the list furnished by the judge for the new writ were taken from this number.

The defendant then moved the court to quash the new *venire facias* on the ground that the persons named in the list furnished by the judge and contained in the writ "were embraced in the previous *venire facias* and were in attendance upon the court." This motion was overruled, and the defendant excepted.

There was no error to the prejudice of the accused in the action of the court here complained of. Section 4896 of the Code expressly authorized the trial court, upon quashing the writs, to direct a new one and to furnish a list of jurors to be summoned thereunder. The writ and list were regular, and no reason has been shown why the jurors thus summoned were not duly qualified to serve. Indeed, the record affirmatively shows that they were "free from all legal exception." As already pointed out, so far as appears, the court might very well have denied the first motion to quash, because it was perfectly proper to supplement by an alias writ the panel which had been summoned and was in attendance under the original writ. This had been done, and it thus appears that the court did an unnecessary thing in quashing the original and alias writs, but an equally harmless thing in directing a new one. If the number and qualifications of the jurors available under the original and alias writs were in accordance with the law, surely it cannot be reasonably said that identically the same persons were rendered incompetent as jurors by the unnecessary but harmless process of summoning them a second time. The controlling object of the law is to secure a fair and impartial jury, and there is nothing in the record to indicate that this end was not attained in the instant case.

This conclusion is not, as contended by counsel for the defendant in serious conflict with the decision in *Looney* v. *Commonwealth*, 115 Va. 921. It was there held to have

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been error for the trial judge to designedly include in a new *venire facias* the same names embraced in a former writ which had been quashed, but the opinion must be read in the light of its own facts, and in that case the original *venire facias* had been quashed because the list had been drawn in the presence of a commissioner in chancery who was one of the prosecuting attorneys. While there was no charge of improper motive or intentional misconduct on the part of the commissioner, it was practically a concessum in the case that the persons thus drawn were improper jurors, and ought not to be allowed to serve. There was no formal irregularity in the writ, but an inherent incompetency of the jurors as such, and this being true, of course the mere substitution of a new writ with the same list would not remove the incompetency. In the instant case we have the converse proposition, namely, a list of persons free from any sort of incompetency as jurors, and they certainly cannot be rendered incompetent merely by quashing, for some alleged but undisclosed irregularity, the writ of *venire facias* under which they have been previously summoned. Furthermore, it is to be noted that the new *venire facias* condemned in the case cited was in itself vitally at variance with certain mandatory provisions of the statute under which it was issued, while the writ in this case is strictly regular in every detail.

The *Looney Case* does not refer to, and is not to be construed as overruling the principle announced by this court in *Mitchell* v. *Commonwealth*, 33 Gratt. (74 Va.) 845, 851, and *Waller and Boggs* v. *Commonwealth*, 84 Va. 492, 495, in both of which it was held that competent and suitable jurors were not rendered incompetent and unsuitable by the mere fact that they had been named in a previous *venire facias* which had been quashed.

The second assignment of error involves the action of the court in giving and refusing instructions.

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The defendant asked for and the court refused to give instructions "J" and "K" which were, respectively, as follows:

"J. The court instructs the jury that the defendant, A. T. Reynolds, at the time of the shooting of Alvis Reynolds, had the right to determine from appearances, and the actual state of things surrounding him as to the necessity of acting in self-defense; and if he acted from reasonable and honest conviction as to his danger, he will not be held responsible criminally, even if he was mistaken as to the danger he was in."

"K. The court instructs the jury that where the killing takes place in a combat, the prisoner has the right in determining his danger of great bodily harm, to take into consideration the relative size and strength of the party assaulting him."

We are of opinion that there was no error in refusing the two instructions above quoted, for the reason that in so far as they correctly stated the principle of law intended to be invoked thereby, they were sufficiently substituted by instruction "I" given for defendant as follows:

"The court instructs the jury that if they believe from the evidence that Alvis Reynolds, at the time of the fatal difficulty, did any act, or acts, of such a character as to cause the defendant, A. T. Reynolds, to reasonably believe that he, the said Alvis Reynolds, intended to kill him, or to inflict upon him some great bodily harm, and that such danger was imminent, then you should find the defendant not guilty."

It cannot be doubted that if the jury had accepted the theory of self-defense and had credited the testimony of the defendant in support thereof, they would have extended to him exactly the same consideration and leniency by reason of instruction "I" which they would have given him if, instead thereof, or along therewith, the court had like-

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wise given instructions "J" and "K". It is manifest, therefore, that there was no error in refusing to give the two instructions last mentioned. *Nicholas* v. *Commonwealth*, 91 Va. 741, 751.

Instruction "L," asked for by the defendant and refused, was as follows: "The court instructs the jury that if they believe from the evidence that no angry words had passed between A. T. Reynolds and the deceased, and that no visible signs of anger had manifested themselves on the part of A. T. Reynolds against the deceased, at any time prior to their meeting together at the creek where the killing was done, and that sharp words were spoken by A. J. Reynolds to the defendant at the creek, and that an altercation ensued in which the deceased was killed, these facts are sufficient to warrant the jury in finding that the killing was not done with malice aforethought; but the presumption is that such killing was upon heat of passion and hot blood, and therefore manslaughter only."

The court was clearly right in refusing this instruction. It is not denied that there was an altercation at the creek between the accused and the defendant, but there was a marked conflict in the evidence as to the character of such altercation. According to the testimony of the Commonwealth, the accused shot the deceased upon what might well have been considered very sight provocation, and it would have been error for the court to tell the jury, as in effect requested by this instruction, that any altercation, even though it included "sharp words" by the deceased, would rebut the presumption of malice arising from the killing and would give rise to the contrary "presumption that such killing was upon heat of passion and hot blood and therefore manslaughter only." Sharp words alone do not constitute adequate provocation to reduce a killing with a deadly weapon from murder to manslaughter. See *McCoy* v. *Commonwealth*, decided to-day. The law in this respect was propounded in defendant's instructions "F" and

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"O" quite as favorably as he was entitled to ask for it. These instructions were as follows:

"F. Voluntary manslaughter is the unlawful killing of a human being in heat of blood and sudden passion, upon adequate provocation, and not for malice. And involuntary manslaughter is the unintentional killing of a human being in connection with the doing of an unlawful act."

"O. The court instructs the jury that although they may not believe from the evidence in this case that A. T. Reynolds, the defendant, shot and killed Alvis Reynolds in self-defense, yet if it appears from the evdience that the killing was not because of any previous grudge, or malice, but was done in the course of a sudden quarrel, in mutual combat, upon sudden provocation, and that the provocation was more than slight, then you cannot find the defendant A. T. Reynolds guilty of any higher offense than voluntary manslaughter, which is punishable by confinement in the penitentiary not less than one, nor more than five years."

This brings us to defendant's instruction "M", which was refused, and is as follows:

"The court intructs the jury that proof of ill-will against Edgar T. Reynolds some time prior to the killing, cannot be taken as any evidence of malice or ill-will against Alvis J. Reynolds, unless there is shown to be some connection between the trouble between A. T. Reynolds and Edgar T. Reynolds, and that between A. T. Reynolds and the deceased."

We do not perceive any good reason why this instruction should not have been given if the defendant so desired, but he was not prejudiced by the court's refusal to give it. for the reason that the evidence of the Commonwealth which, as conclusively shown by the verdict, was accepted by the jury as true, established a direct and immediate "connection between the trouble with A. T. Reynolds and Edgar T. Reynolds, and that between A. T. Reynolds, and the deceased," so that the giving of the instruction would

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have been tantamount to telling the jury that the defendant's ill-will towards his son Edgar ought to be taken into consideration as evidence of his malice in killing the deceased. The bad feeling between him and his son Edgar may have originated earlier, but the quarrel between them that day grew out of the game of cards. When the accused returned to the game after arming himself, it may be fairly said that he appeared to be mad at the whole party, and soon afterwards exhibited his temper by a merciless attack on the mule. After the shooting he said that he had just killed one son (calling him a vile name) and was ready to kill another, referring in this threat to Edgar.

The proposition of law relied upon in this connection by counsel for the defendent that as a general rule the malice of an accused person against some other than the one whom he subsequently kills is not admissible in evidence to prove his malice against the deceased, has no application to the facts of this particular case.

In *McKinney* v. *State,* 8 Tex. App. 626, it was held to be well settled that when the state of mind constitutes an essential part of the crime charged, testimony of such previous acts, conduct or declaration of the accused as tend to establish the state of mind is competent, notwithtanding they may constitute in law a distinct crime. See also Whart Cr. Ev. (10th ed.), sec. 40, p. 150; *State* v. *Deschamp,* (La.), 21 Am. St. Rep. 392; Whart. on Homicides, secs. 701, 702.

In 8 Ency. Ev., p. 376, it is said: "The circumstances directly leading up to the assault or homicide are admissible as evidence to prove or rebut malice though such evidence may tend to prove the commission of a distinct offense. So also evidence of an assault immediately after an assault or homicide upon another member of the family or party of the person assaulted, or upon one offering him assistance, is admissible to prove the maliciousness of the original act."

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Again, in 8 Ency. Ev., p. 378, it is said: "Malice against a particular person cannot be proved ordinarily by malicious acts or conduct against another, even if the other be a member of the same family, but it may be proved by evidence of hostility or ill-will against the entire family, or against the faction, class or race of which the particular person is a member." See also *Killins* v. *State,* 28 Fla. 313, 334, 9 So. 711; *Denson* v. *State,* (Tex. Crim. App.) 35 S. W. 150.

In *State* v. *Gainor,* 84 Ia. 209, 50 N. W. 947, it was held that the declaration by the accused, after he had killed a policeman and had gone to the hotel where he lived, that he had killed one policeman and wished he had killed another, was competent evidence as showing his feelings towards the deceased at the time the homicide was committed.

In the light of these authorities and of the evidence in this case, which the jury manifestly accepted as true, (and as to which evidence their belief could not have been influenced by the instruction in question), they must have believed that the anger and malicious state of mind existing on the part of the accused towards his son Edgar was directly connected with and was operating at the time of the homicide. He was, therefore, better off wihout the instruction than he would have been if the court had given it.

3 }

The next assignment of error is based upon the refusal of the trial court to sustain the objection of counsel for the defendant to a part of the argument made to the jury by the attorney for the Commonwealth. The language complained of was as follows: "In the eyes of the law, if I arm myself with a pistol to kill one special individual, and I go and kill another and different person, I am just as guilty as if I had killed the person I first got the pistol to kill; and when the defendant here, Anthony Reynolds, went to that house and got his pistol for Edgar Reynolds to kill him with, and afterwards killed Alvis Reynolds, under the

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circumstances claimed to be established by the evidence, with it, he is guilty of malice towards the deceased, Alvis Reynolds."

It follows from what we have said in connection with the refusal of instruction "M", that there was no error in refusing to exclude this argument from the jury. The first part of it, as quoted, was not an accurate statement of law, but as a whole the argument was substantially correct in principle and was supported by the law and the evidence.

The only remaining assignment of error insisted upon is that the court refused to set aside the verdict on the ground that it was contrary to the law and the evidence. It follows from what has been said in the course of this opinion that this assignment must be overruled.

The judgment complained of is affirmed.

Affirmed.

SEYMOUR, ET ALS., *v.* COMMONWEALTH.

(*Wytheville, June 15, 1922.*)

1. CRIMINAL LAW.— Murder — Evidence — Intoxicating Liquors — Robbery of Vessel.
2. IDEM.—Pleading and Practice—*Res Judicata*—Exclusion of Evidence—Previous Trial for Murder of Another—Conspiracy—Twice in Jeopardy—Constitution, sec. 8—Plea of Former Acquittal or Conviction.
3. IDEM.—Jury—Exclusion of Competent Juror—Evidence—Conversation Between Accused Conspirators—Previous Similar Crimes.
4. IDEM.—Trial—Suspension Because of Absence of Accused—Continuance—Code, sec. 4894.
5. IDEM.— Jurisdiction — Indictment — Allegation of Location of Crime—Code, sec. 5910.

Error to Corporation Court of city of Norfolk.

Affirmed.

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J. L. Broudy and *Tazewell Taylor*, for the plaintiffs in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile*, for the Commonwealth.

The plaintiffs in error, who were jointly tried, have been found guilty of murder in the first degree and sentenced to twenty years confinement in the penitentiary. They, together with one J. G. Moore, who was the chief witness for the Commonwealth, were jointly indicted for the murder of one Hadie Sasaki, a member of the crew of a merchant vessel owned by a Japanese corporation, while the vessel was in the Elizabeth river a few hundred yards from the Lambert's Point pier.

The evidence upon which the Commonwealth relies to justify this conviction may be thus summarized: The accused were jointly engaged in illicit traffic in ardent spirits. Their customary method of securing much, if not all of the liquor which they sold was to board foreign vessels while lying in the harbor, and, acting in concert, to negotiate for the purchase of liquor there held by members of the crew for sale. After making the bargain and having the liquor produced for delivery, they would display pistols and badges, impersonate officers and pretend to arrest the vendors of the liquor and sometimes members of their own party also, charging them with the illegal sale and purchase of intoxicating liquor, in violation of the prohibition law. They would then take possession of such liquor as contraband and sell it as their own.

On the night of December 24, 1920, with a similar purpose in view, they boarded the Japanese vessel "Kaisho Maru," having learned that there was whiskey on board that ship for sale. There were six in the party, the five who were indicted and one Roy Tinder, who was taken on the launch which went out to the vessel, at the last

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moment, because Sterling, who was expected, failed to appear at the appointed time. They took with them three pairs of handcuffs, some flashlights, a pad of fifty to seventy-five blank search warrants, six badges, three being the badges for the United States Internal Revenue officers, one city of Norfolk policeman's badge, one Norfolk county special policeman's badge, and another described as "some kind of secret service" badge. Five of them had pistols loaded, and one, Graham, also wore a belt full of cartridges. Two of them boarded the ship and entered into negotiations with members of the crew, showing their money and pursuing their usual method. When these negotiations were concluded and a large quantity of whiskey (45 cases) had already been brought on deck for delivery to them as purchasers, a message was sent to the other four, who had remained on the launch, to come aboard to get the whiskey. Just about this time Jones disclosed his badge, alleging that they were officers of the law, and told the Japanese with whom they had negotiated that they were under arrest. They indicated their purpose to resist, and Jones drew a pistol and told one of them that he didn't wish to kill him but to lock him up. Some one commenced shooting, and the wireless operator of the ship and a fireman, both Japanese, were handcuffed. Shortly thereafter the lights on the ship were turned off by an engineer, member of the crew, and there was a general affray in the course of which a number of shots were fired, one of the Japanese crew was killed, one mortally wounded, and two of the accused wounded. There are many other details of the affray and other antecedent and succeeding events which we think it unnecessary to recite.

Before this trial they had been tried for the murder of Shagji Miyau, who was killed at the time, and acquitted. Then followed this trial and their conviction for the murder of Hadie Sasaki, who was mortally wounded in the

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back during the affray and died about four o'clock the next morning.

There was contradiction by the defendants of the incriminating evidence of Moore, upon whose testimony their conviction chiefly rests, but there was also much corroboration, both in the testimony introduced in behalf of the accused as well as in that of the Commonwealth. As they jury credited the evidence for the Commonwealth, in which they were fully justified, it is clear that the judgment should be affirmed, unless there was some prejudicial error in the procedure.

2 }

The precise question emphasized in the argument has never been raised, we believe, in this jurisdiction, but it has been much discussed elsewhere. The accused filed a paper, designated as a special plea of *res judicata*. It tenders no issue of fact, but prays that the court exclude from the consideration of the jury all evidence purporting to set up or charge them on the occasion in question with robbery or attempted robbery, and a conspiracy to commit the same, for the reason that on the previous trial for the murder of Shagji Miyau, upon substantially the same evidence, the defendants and each of them were duly acquitted, and that as a result of that previous trial each and every issue involved and submitted to the jury, including the issue of robbery, or attempt to commit the same, or conspiracy to commit the same, was decided in favor of the defendants; and they allege that as the result of that previous trial the Commonwealth and the parties to the said indictment were fully and completely foreclosed and estopped from setting up or introducing evidence of said robbery or attempt to commit the same and conspiracy to commit the same, and other matters bearing upon said robbery and attempt to commit the same and conspiracy to commit the same, and concluded with an offer to verify. This plea was rejected.

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It is seen that this alleged plea is merely a prayer to exclude certain testimony which had been introduced at their previous trial for a different homicide, and this before the testimony on this trial had been offered. Inasmuch, however, as this testimony was subsequently offered and a motion then made to exclude it, which was overruled, we will pass upon the question as properly raised.

It is observed that in substance it is an effort to secure the benefit of the immunity clause of the Constitution prohibiting persons accused of crime from being placed twice in jeopardy for the same offense, though it is admitted that inasmuch as this indictment for the murder of Hadie Sasaki charges a different crime from the one for which they had been already acquitted, neither the defense by plea of former acquittal nor immunity because previously in jeopardy could be successfully invoked. No indirection is necessary when such immunity exists, for it may be confidently and successfully invoked.

That the proper method of raising the question of former jeopardy is by special plea of former acquittal or conviction, seems to be well settled. 2 Whart. Cr. Ev., (10th ed.), sec. 592, and cases cited.

In *Justice* v. *Commonwealth*, 81 Va. 217, it is said: "But the doctrine of estoppel, strictly speaking, is not applicable to the Commonwealth in a criminal prosecution. The nearest approach to it is the doctrine, founded on the maxim of the common law, that no one shall be twice put in jeopardy for the same offence. 'This doctrine,' says Bigelow, 'has a close relation to the subject of estoppel by former judgment, and may be considered as the criminal law counterpart of the same doctrine. But the doctrine rests upon technical notions of jeopardy, and not upon the principle of *res judicata*,' etc. Bigelow on Estoppel (3d ed.) 47."

While unprepared to say that no case can possibly arise in which the doctrine of estoppel or *res judicata* can be in-

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voked against the Commonwealth, we are clear in our view that it cannot be invoked in this case.

In *Vaughan* v. *Commonwealth,* 2 Va. Cas. (4 Va.) 273, it is held that where one has been indicted for shooting one person and acquitted, and then indicted for shooting another, the plea of *autrefois acquit* will not be supported, although the same act of shooting is charged in each indictment, for the jury who tried the first indictment might have acquitted the prisoner on several grounds which would not affect the second trial.

In *Smith* v. *Commonwealth,* 7 Gratt. (48 Va.) 593, it is held that a conviction for advising, enticing and persuading one slave to abscond is not a bar to prosecution for advising, etc., another slave to abscond, although the act of advising, etc., charged occurred as to both slaves at the same time and by the same words and acts.

In *McCoy* v. *State,* 46 Ark. 141, where there was a conflict in which a man was killed and his wife wounded in one and the same transaction, the defense that the accused had been acquitted of the charge of assault with intent to kill the wife did not prevent his prosecution on the charge of murder of the husband.

In *Jones* v. *State,* 61 Ark. 88, 32 S. W. 81, it is held that the fact that the act of killing two persons was so closely connected in point of time that it was impossible to separate the evidence relating to each of them, would not necessarily make the killing of the two one act or one offense, or the conviction for the killing of one a bar to a prosecution for the killing of the other."

In *People* v. *Majors,* 65 Cal. 138, 53 Am. Rep. 300, 3 Pac. 597, 5 Am. Crim. Rep 486, it is held that where two persons were killed at the same point of time in pursuance of a design to rob, it does not render a conviction for the murder of one a bar to a prosecution for the killing of the other; and while admitting that there was authority to the contrary, the court said that the better rule and that estab-

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lished by the great weight of respectable authority, is that the murder of two persons, even by the same act, constitutes two offenses, for each of which a separate prosecution will lie, and that a conviction or acquittal in one case does not bar a prosecution in the other.

Other pertinent cases enforcing the same rule are *Fews* v. *State,* 1 Ga. App. 122, 58 S. E. 64; *Johnson* v. *State,* 65 Ga. 94; *Baker* v. *Commonwealth,* 20 Ky. L. Rep. 879, 47 S. W. 864.

In *State* v. *Vines,* 34 La. Ann. 1079, 4 Am. Crim. Rep. 296, it appears that pursuant to a conspiracy to kill one person, one of the defendants shot and killed the intended victim and the other defendant killed another person. It was held that a plea of acquittal of one of the defendants and the conviction of the other defendant of manslaughter under an indictment charging murder of the intended victim, was not good in bar of a prosecution for killing the second person, and the court said that the killing of one was a totally distinct and different offense from the killing of the other, although both acts were done in execution of the same conspiracy; that they were not different grades of the same crime; they were not two felonies resulting from the indentical act; they were not different aspects of the same unlawful act; and that they bore no such relation to each other, as that one of them could be said to be merged in the other. 31 L. R. A. (N. S.) 720, note; *Teat* v. *State,* 53 Miss. 439, 24 Am. Rep. 708; *People* v. *Mendelson,* 264 Ill. 453, 106 N. E. 249, L. R. A. 1915c, 627.

There is an illuminating note upon the precise question as applicable to cases where there is a conspiracy shown, in *Patterson* v. *State,* 96 Ohio St. 90, 117 N. E. 169, L. R. A. 1918A, 588. It is there said that "one charged with a substantive offense committed in pursuance of a conspiracy, cannot plead former jeopardy based upon a previous conviction or acquittal of another similar but dis-

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tinct offense committed in pursuance of the same conspiracy." Citing *Wallace* v. *State* (1899), 41 Fla. 547, 27 So. 713; *State* v. *Barnes* (1910), 26 S. D. 268, 128 N. W. 170; *Augustine* v. *State* (1899), 41 Tex. Cr. Rep. 59, 96 Am. St. Rep. 765, 52 S. W. 77.

The recent case of *State* v. *Corbett*, S. C., 109 S. E. 133, cites many additional authorities, though there the question was raised by plea of former acquittal.

The case of *Patterson* v. *State, supra*, raises a question identical with that raised here. There the accused engaged in a criminal conspiracy having for its purpose the larceny of specific automobiles belonging to separate owners, and in pursuance of the plan his confederate stole the automobiles at different times and places, and it was held that each theft constituted a separate and distinct offense, and that the acquittal of one does not place him twice in jeopardy on the trial of the other. It is observed that there, as here, the evidence of the conspiracy was the same in each case. The protection which is guaranteed to persons accused of crime is that they shall not be placed twice in jeopardy for the same offense. There is no constitutional or statutory guarantee that evidence offered upon the trial of an accused person for a different offense from that of which he was either convicted or acquitted may not thereafter be offered to prove a distinct but related offense. If the Commonwealth is concluded here by the verdict of acquittal for the murder of Shagji Miyau, its effect would be to allow the adjudication of the issue there determined to operate as a substitute for a plea of former jeopardy, which plea clearly does not lie. If it be true that the effect of the former acquittal is to afford them immunity from trial for the murder of Hadie Sasaki, then it is not impertinent to inquire what would have been the effect of their conviction at that trial, Could it be successfully contended that the proof of the conspiracy and attempt to rob had been so conclusively established by the con-

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viction of these defendants on that first trial for the murder of Miyau, as that it could not be questioned by them upon the second trial for the murder of Sasaki? Manifestly, this could not be true, but we are here asked to apply the converse of that proposition to the Commonwealth and to hold that no evidence is admissable here as to such conspiracy merely because of their previous acquittal of the other homicide, and thereby to accord the accused an immunity which is not contemplated either by Constitution or statute, or based upon justice or reason. The former acquittal may have resulted from many causes, and there is no sufficient justification for the assumption upon which the whole argument for the accused is based, namely, that on the former trial they were acquitted of a conspiracy to rob. They were neither indicated nor tried for that offense. They were indicted and tried for a specific murder and of that crime alone can it be truly said that they were acquitted? It may be that in the interval the Commonwealth was able to strengthen the evidence against them. Certainly it is true that at least four witnesses testified in this case who did not testify in the other, and the evidence of the dying declaration of Sasaki, in substance, that he was shot in the back by one of the conspirators while running away, which if believed conclusively shows the guilt of the accused, clearly would not have been admissable upon their former trial for the murder of Miyau.

The Commonwealth having the right to indict them for each homicide, though alleged to have been committed pursuant to the same conspiracy, has also the right to try them under each indictment—indeed, could not do otherwise—and having this right is entitled to introduce all of the evidence tending to prove the commission of the specific crime charged. Whatever confusion there may be in the cases with reference to such a defense, no subtleties of reason can sustain it in this case; we find no precedent therefor; and the question was correctly determined by the trial court.

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There are numerous other errors alleged, as to which little discussion is necessary, because the rulings of the trial court are well supported by precedents in this State. Our failure to deal with them more in detail must be attributed to our indisposition to repeat propositions which need no repetition. Among these assignments is that the court rejected one of the veniremen. This question is settled by the case of *Fishburne* v. *Commonwealth*, 103 Va. 1023, where it is held that it is not error that a competent juror was excluded from the panel. It is altogether different when an incompetent juror is accepted, because an accused person is entitled to a fair jury, but if he gets a fair jury he has no right to complain that other fair jurors were not sworn to try his case. *Clore* v. *Commonwealth*, 8 Gratt. (49 Va.) 612.

Another assignment relates to the admission of testimony relating to a conversation between some of the alleged conspirators on the morning after the homicide. Inasmuch as the court expressly limited the effect of this testimony and instructed the jury that it could not be considered except as against those of the accused who were present, this assignment is without merit.

It is alleged that the court erred in permitting testimony as to recent previous robberies of ships by these defendants, acting together. The court carefully followed the ruling of this court made so long ago as *Trogdon* v. *Commonwealth*, 31 Gratt. (72 Va.) 862, and told the jury that they could only consider this testimony in connection with and as explanatory of the intent, purpose and plan of the accused on the night of December 24, 1920, at the time the crime here charged was committed, and that they could not consider it as proof that the accused or any of them had committed other offenses not charged in the indictment; and this limitation was emphasized and their rights still further guarded by the court in giving an instruction offered

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by the accused. *State* v. *Briggs*, 122 Minn. 493, 142 N. W. 823; 1 Whart. Cr. Ev. (10th ed.), secs. 31, 39.

Complaint is made of the instructions, but it is sufficient to say as to these that there were twelve granted upon notion of the defendants without change, and four more offered by them were slightly modified by the court, and these fully and clearly presented every theory justified by the evidence introduced in behalf of the defendants, and accorded them every right; while those of the Commonwealth followed the established precedents and no valid objection is suggested as to any of them.

There is an exception growing out of this circumstance; Seymour, one of the defendants, on the morning of April 20, 1921, during the trial, was taken ill in jail, so that upon the advice of physicans the trial was suspended from time to time because of his absence from the court-room, until 10 o'clock on the morning of April 22, when he was brought into court and then the trial proceeded. The statute, Code 1919, sec. 4894, provides that a person tried for a felony shall be personally present during the trial, but it also provides that a motion for a continuance, whether made before or after the arraignment, shall not be deemed a part of the trial. Certainly this suspension was no part of the trial. It would be indeed a reflection upon the common sense of those who adminster and construe the law, if such a suspension, which was necessitated in order that the defendant might be present and thus to safeguard his rights, should be held to be a denial of his rights and ground for reversal. His right to be present was not thereby denied, but on the contrary accorded.

The twelfth assignment challenges the territorial jurisdiction of the trial court by demurrer and motion to quash. The indictment contained two counts, one alleging that the crime was committed in the Elizabeth river, between the city of Norfolk and the city of Portsmouth, and the other

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that it was committed between the city of Norfolk and the county of Norfolk. Code 1919, section 5910 provides that corporation courts shall have concurrent jurisdiction with the circuit courts over offenses committed in any county within one mile of the city, and the evidence shows that the offense was committed within 500 or 600 yards of the offense was committed yithin 500 or 600 yards of the Lambert's Point pier, between that place and the county of Norfolk. It thus clearly appears that the court had jurisdiction, because the homicide was committed within one mile of the city limits.

Affirmed.

SOUTHERN RAILWAY CO. v. RUSSELL, TRUSTEE, &c

(*Wytheville, June 15, 1922.*)

1. RAILROADS.—Carriers—Damage to Interstate Shipment—Delivery to Initial Carrier in Good Condition—Presumption.
2. CONFLICT OF LAWS.—Judgment Prior to Code, 1919—Appeal and Verdict Subsequent to Code, 1919—Amendment of Code, 1919 by Acts of 1918.
3. CONSTITUTIONAL LAW.—Statutes—Title—Amendatory Act—Constitution, sec. 52.

Error to Law and Equity Court of city of Richmond.

Affirmed.

Munford, Hunton, Williams & Anderson, for the plaintiff in error.

H. W. Goodwyn, for the defendant in error.

BURKS, J.:

This action originated in a warrant in the Civil Justice's Court of the city of Richmond. The Civil Justice's Court rendered a judgment against the railway company for $100 and the costs, from which judgment the railway company appealed to the Law and Equity Court of the city

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of Richmond. In the latter court there was a trial *de novo* before a jury, and a verdict and judgment against the railway company for $80 and interest and costs. To that judgment the writ of error in this case was awarded.

The action was to recover for damage to a carload of watermelons shipped from a point in Georgia to the consignees in Richmond, Virginia. The rights and liabilities of the parties, therefore, are not affected by section 3996 of the Code, applicable to shipments originating in this State. The watermelons arrived in bad condition, and in order to recover it was necessary for the plaintiff to show, either directly or indirectly that they were received in good condition. This he undertook to do by showing that they were delivered to the initial carrier in good condition. If they were so delivered, there was a presumption that they were in like good condition when received by the delivering carrier, and it was liable notwithstanding the provisions of the Carmack Amendment of the Interstate Commerce Act.

In *Chicago & Northwestern Ry. Co.* v. *Whitnack Produce Co.*, (Adv. Op. U. S. Sup. Ct., April 10, 1922), 42 Sup. Ct. 328, it is said: "While this court has not expressly approved it, we think the common law rule, supported both by reason and authority, is correctly stated in section 1348, Hutchinson on Carriers, Third Edition—

"'A connecting carrier, who has completed the transportation and delivered the goods to the consignee in a damaged condition or deficient in quantity, will be held liable in an action for the damage or deficiency, without proof that it was occasioned by his fault, unless he can show that he received them in the condition in which he has delivered them. The condition and quantity of the goods when they were delivered to the first of the connecting carriers, being shown, the presumption will arise that they continued in that condition down to the time of their delivery to the carrier completing the transportation and

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making the delivery to the consignee, and that the injury or loss occurred while they were in his possession.'

* * * * * * * * * *

"The petitioner insists that this common law rule conflicts with the Carmack Amendment to the Interstate Commerce Act, c. 3591, 34 Stat. 584, 595, which requires issuance of a through bill of lading by initial carrier and declares it liable for damage occurring anywhere along the route, as interpreted and applied by this court. But we find no inconsistency between the amendment or any other federal legislation and the challenged rule. Properly understood, *Charleston, etc., Ry. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597, especially relied upon, gives no support to the contrary view.

* * * * * * * * * *

"Here there is no question of conflict between a State statute and any federal policy; and nothing in the words of the amendment indicates a legislative purpose to abrogate the accepted common law doctrine concerning presumption. The suggestion that by imposing additional liability upon the initial carrier the amendment provides an adequate remedy for shippers and thereby removes the necessity for any presumption against the terminal one and impliedly abrogates the rule, is unsound. There are adequate reasons why shippers should have the benefit of both; and we think Congress so intended."

The plaintiff filed the affidavit of the consignor, as authorized by section 3 of an Act of Assembly approved March 16, 1918. Acts 1918, p. 467, ch. 291. This act amended a previous act of March 24, 1914. Acts 1914, p. 426, ch. 250. The only difference between these two acts is that the act of 1914 permitted the use of the affidavit only where the amount involved did not exceed $25.00, and the act of 1918 increased the amount involved to $300.00. The section permitting the use of the affidavit was first inserted in the statute by the act of 1914, but this act was

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itself an amendment of an act approved February 29, 1908. Acts 1908, p. 143, ch. 116. The validity of the last mentioned act is in no way assailed, but, on the contrary, is expressly admitted. The use of the affidavit in the instant case is authorized solely by virtue of section 3 of the act aforesaid of 1918.

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The judgment in the Civil Justice's Court was rendered August 20, 1919, before the Code of 1919 took effect. There was an appeal to the Law and Equity Court of the city of Richmond where the case was tried *de novo* and a verdict rendered April 15, 1920, after the Code took effect. But the enactments of the session of 1918, so far as they vary from or conflict with the Code, are deemed to be subsequent to the Code. Section 6568 of the Code. The act of 1914 was carried into the Code as section 3928, but with some changes in the phraseology and omitting the clause with reference to the affidavit. The rights and liabilities of the parties, therefore, are determinable by the act of 1918, which amended the act of March, 1914.

3

It is claimed by the plaintiff in error that the act of 1918 violates section 52 of the Constitution of this State, declaring that "no law shall embrace more than one object, which shall be expressed in its title." It is conceded in the petition for the writ of error that "the sole question involved is whether the court erred in permitting the plaintiff to introduce in evidence an affidavit for the purpose of showing the condition of the shipment when it was delivered to the initial carrier. The answer to this question depends upon the constitutionality of" the act aforesaid of March 16, 1918. It is conceded also that, as this is an amendatory act, if the title of the original act is sufficient to embrace the matters covered by the provisions of the act amendatory thereof, it is unnecessary to inquire whether the title of the amendatory act would of itself be sufficient. *Iverson Brown's Case,* 91 Va. 762. It is necessary, there-

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fore, to inquire whether the title of the original act or of the amendatory act is sufficient. The titles of these several acts are as follows: 1908—"An act to regulate the time and manner in which common carriers doing business in this State shall adjust and pay just freight charges, and claims for loss or damage to freight and claims for storage, demurrage and car service" 1914—"An act to amend and re-enact an act entitled an act to regulate the time and manner in which common carriers doing business in this State shall adjust and pay just freight charges, and claims for loss or damage to freight and claims for storage, demurrage and car service, approved February 29, 1908;" 1918—"An act to amend and re-enact an act to regulate the time and manner in which common carriers doing business in this State shall adjust and pay just freight charges and claims for loss or damage to freight, and claims for storage, demurrage and car service, approved March 24, 1914." As practically the same descriptive language is used in all three acts we need only inquire: Is the title of the original act of 1908 broad enough to cover the provisions of section 3 of the amendatory act of 1918?

We have so often laid down the rules for the construction of the language of section 52 of the Constitution that there is practically nothing left to be said on the subject.

In *Town of Narrows* v. *Giles County*, 128 Va. 572, 582-3, one of the latest cases on the subject, it is said: "The constitutional provision was never inteded to hamper honest legislation, nor to require that the title should be an index or digest of the various provisions of the act, and it is rare that the generality of the title is a valid objection thereto. The fact that many things of a diverse nature are authorized or required to be done in the body of the act, though not expressed in its title is not objectionable, if what is authorized by the act is germane to the object expressed in the title, or has a legitimate and natural association therewith, or is congruous therewith, the title is suffi-

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cient. This subject is fully discussed by Judge Riely in *Commonwealth* v. *Brown*, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110. See also *Ingles* v. *Straus*, 91 Va. 209, 21 S. E. 490; *Commonwealth* v. *Willcox*, 111 Va. 843, 69 S. E. 1027; *Commonwealth* v. *Chesapeake & Ohio Ry. Co.*, 118 Va. 261, 87 S. E. 622; *Cochran* v. *Commonwealth*, 122 Va. 801, 94 S. E. 329; *Luchessi* v. *Commonwealth*, 122 Va. 872, 94 S. E. 925, and cases cited. Furthermore, if there is doubt as to the sufficiency of the title, the doubt must be resolved in favor of its sufficiency, as courts will not declare an act of the legislature unconstitutional unless it is plainly so. *City of Roanoke* v. *Elliott*, 123 Va. 398, 96 S. E. 819, and cases cited. Of course the title must not be made a cover for surreptitious or incongruous legislation, nor be such as to mislead the legislature or the people, but should fairly state the general subject covered by the body of the act. *Powell* v. *Supervisors*, 88 Va. 707, 14 S. E. 543. Subject to these limitations, the generality of the title is not a valid objection."

Nothing remains to be done now but to test each case by the rules heretofore laid down. In the case in judgment, is the title of the act of 1908 broad enough to cover the provision of section 3 of the act of 1918 with reference to the use of the affidavit. That title is: "An act to regulate the time and manner in which common carriers doing business in this State shall adjust and pay just freight charges, and claims for loss or damage to freight and claims for storage, demurrage and car service." The amendment consists of the addition of section 3, which is as follows:

"3. In any action which may be instituted pursuant to this act before a justice of the peace, or a civil justice court for an amount not exceeding three hundred ($300.00) dollars, either party at or before the return day of the warrant may file an affidavit relating to the subject matter and the other party to such action shall have a right of continuance for a reasonable time; provided, that any party

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to such warrant may give reasonable notice to the party filing such affidavit and take the deposition of the affiant or affiants, at such time and place as the court may prescribe, the taking of such deposition to be governed by the rules of law in force regarding the cross-examination of witnesses. Such affidavits and depositions shall be read with the same force and effect as if taken in the form of a deposition after due notice to the other party. In the event of appeal of any such action such affidavits and depositions shall be read in the appellate court with the same force and effect as in the civil justice court, or before the justice of the peace."

It will be observed from the title of the act that it is a regulatory statute. The word "regulate" is very comprehensive in its scope, as is manifest from the interpretation put upon it by the Supreme Court of the United States in cases arising under the provisions of the Federal Constitution giving to the Congress power "to regulate commerce." Black's L. Dict., "Regulate."

To *regulate* is to fix or control the manner in which a thing is to be done; to prescribe a rule or method for doing it. It is comprehensive enough to cover the exercise of authority over the whole subject to be regulated. 4 Words & Phrases, (2d ed.) 234. To regulate the manner of adjusting claims for loss of property by a carrier is to exercise authority over the whole subject of such adjustment. The adjustment of a claim presupposes not only the existence of a claim, but some doubt or uncertainty as to its amount or its validity. There must be something to adjust, and to regulate. The *manner* of adjustment embodies the idea of determining the means or manner by which the claim may be established or disproved. Section 3 of the act complained of gives to either party the right to file "an affidavit relating to the subject matter" and the other party is given the right to a continuance for a reasonable time, and also to take the deposition of the affiant after reason-

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able notice. The carrier is required to adjust and pay the claim within sixty or ninety days, as the case may be, after the filing of such claim in the manner required by the statute. He may resist liability, and, in so doing, may use affidavits as provided by the statute. So likewise the claimant may use affidavits in establishing his claim. The character of evidence which either party may use in the adjustment of the claim would seem to be germane to and congruous with the regulation of the manner of adjusting the claim. It is true that the title is to regulate the manner in which the *common carrier* shall adjust, etc., but in regulating the rights and duties of the common carrier, the rights and duties of the shipper are necessarily affected, and what affects the latter must be germane to what affects the former.

In *Westgate* v. *Town of Adrian*, 161 Mich. 331, the title of the original act, passed in 1887, was "An act to regulate the use of steam engines, steam wagons or other vehicles, which are, in whole or part, operated by steam, on the public highways of this State, and to prohibit the blowing of steam whistles upon the public highways of this State." In 1903 the body of the original act was amended by providing, "that no township shall be liable for any damages sustained by the breakage of any bridge or culvert by any steam engine or steam vehicle, weighing more than six tons." The plaintiff was the owner of a steam traction engine, used by him to provide power to run a threshing machine or grain separator. When moving from farm to farm the plaintiff usually hitched the separator behind the engine, which furnished the power to propel itself and to haul the separator. The engine, when supplied with the water necessary for its operation, weighed approximately eight tons. On September 9, 1907, while moving the engine over a bridge located upon one of defendant's highways, the bridge collapsed, permitting the engine to fall through and become damaged. A directed verdict was

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found for the defendant, and the plaintiff appealed. It was contended on behalf of the plaintiff that the title of the act was not broad enough to cover the matter embraced in the amendment, and was, therefore, in violation of a constitutional provision similar to the one under consideration. It was held that the title in question was broad enough to cover the subject matter of the amendment. In the course of the opnion, it was said: "It will be noted that the original title contains the word 'regulate.' Under the term, very broad powers may be exercised. It means both government and restriction. *Dillon* v. *Railroad Co.*, 43 N. Y. Supp. 320; *City of Rochester* v. *West*, 164 N. Y. 510 (58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659); *McWethy* v. *Power Co.*, 202 Ill. 218 (67 N. E. 9).

"Any provisions germane to the subject expressed in the title may properly be included in the act, or added thereto by amendment. It is sufficient if the title fairly expresses the subject, or is sufficiently comprehensive to include the several provisions relating to or connected with that subject."

In *Jonesboro City* v. *Cairo & St. Louis R. R. Co.*, 110 U. S. 192, the title of the act was, "An act to amend the charter of the Cairo & St. Louis Railroad Company," and the body of the act contained a provision validating a prior election held in the city of Jonesboro authorizing a bond issue by the city as a subscription to the stock of the railroad company, and it was held that the title of the act was broad enough to cover the validating section. In the course of the opinion it is said: "The authority of municipalities to make subscriptions in aid of the construction of railroads in Illinois has frequently, if not generally, been given in the charters of the respective railroad corporations. Whether a particular municipality has legislative authority for a subscription to the stock of a particular railroad company can be determined, ordinarily, by referring to the charter of that company. The general sub-

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ject of municipal subscriptions to the stock of this particular company was, therefore, germane to and fairly embraced by the title of the act of 1869. Upon like grounds a provision in the same act legalizing a previous election at which the people voted in favor of a subscription and giving authority to issue bonds for the amount indicated by the popular vote, was sufficiently covered by a title showing that the act in question was amendatory of the original charter of the company; this, because the validity of bonds so issued would depend upon the existence of legislative authority to issue them, and the existence of such authority would ordinarily be ascertained by reference to the charter and amended charter of the railroad corporation." See also *Detroit* v. *Detroit Citizen St. Ry.*, 184 U. S. 391; *Blair* v. *Chicago*, 201 U. S. at p. 451-2; *Montclair* v. *Ramsdell*, 107 U. S. 147; 35 Am. & Eng. Anno. Cas. 84.

A number of cases from this and other jurisdictions have been cited upon the sufficiency of title of acts to cover matter embraced in the enactments, but it is unnecessary to review them as they are only valuable as illustrations. The sufficiency of the title of each act must be determined from a consideration of its title and the body of the act under established rules of construction.

We are of opinion that the title of the original act of 1908 is broad enough to cover the amendment made by the act of 1918, and that the judgment of the trial court so holding should, therefore, be affirmed.

Affirmed.

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STAPLES & STAPLES v. HERVEY.

(*Wytheville, June 15, 1922.*)

1. CONTRACTS.—Construction—Employment of Salesman—Commission—Traveling Expenses.

Error to Law & Equity Court of city of Richmond.

Affirmed.

R. Grayson Dashiell, for the plaintiff in error.

A. H. Sands, for the defendant in error.

PRENTIS, J.:

This case involves the construction of a contract between Staples & Staples, Inc., hereinafter called the employer, and R. H. Hervey, hereinafter called the salesman, the pertinent clauses of which read thus:

"First: Staples & Staples, Inc., guarantee R. H. Hervey a salary of $200.00 per month, same to be paid if requested and to be charged to his account and deducted when making settlement for commissions due.

Second: Staples & Staples agree to advance necessary funds to cover traveling expenses, same to apply against commissions and be deducted when making settlements.

"Fifth: Staples & Staples, Inc., will make settlements for commissions where they exceed advancements on a month basis same to commence 60 days from date of contract."

And their agreement might be terminated on or after 30 days notice in writing.

If the adventure had been successful and the expectations of the parties had been realized, the commissions due to the salesman would have very greatly exceeded the aggregate of the guaranteed salary and expenses, and it is not probable that any question as to the proper construction of the contract would have arisen. The venture, however, was

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very unsuccessful, and after the employment had lasted five months the commissions actually earned by the salesman amounted to only $600.00, whereas his traveling expenses amounted to $916.17, while the employer had advanced to him on account of salary and traveling expenses $1,400. The agreement was dissolved by mutual consent, and the salesman sued his employer for $516.17, that being the difference between the amount of his traveling expenses, $916.17 and the $400 which had been advanced on that account.

The employer denied liability and claimed that inasmuch as the guaranteed salary only amounted to $1,000 while $1,400 had been advanced, it owed nothing to the salesman, but that his indebtedness to it amounted to $400, for which it prayed judgment.

The trial court resolved the dispute by an oral instruction to the jury, which reads thus:

"This is a paper embodying an agreement between the plaintiff and the defendants, providing for the service of the plaintiff as a salesman. It provides in the first clause that the plaintiff is guaranteed a salary of $200.00 per month, same to be paid if requested and to be charged to his account and deducted when making settlement for commissions due. There is no misunderstanding of that language. They agree to pay him a guaranteed salary of $200.00 a month, subject to no deductions on any account except to be taken in connection with his commissions. The fifth section of the contract states exactly how that shall be carried out. 'Staples & Staples, Inc., will make settlements for commissions where they exceed advancements on a month's basis, same to commence 60 days from date of contract.' Therefore, no commissions are to be paid unless they exceed $200.00 a month guaranteed salary. The manifest meaning of that is for the agent to get a living salary of $200.00 a month, guaranteed salary, and if his commissions exceed the $200.000 a month he is to get his commissions in addition. That is plain from that contract.

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In addition to that, the contract says that Staples & Staples agree to advance necessary funds to cover traveling expenses. There the divergence from the guarantee is plain. It is a mere advancement, same to apply against commissions and be deducted when making settlements, emphasizing the fact that the guaranteed salary was not to be commingled with the expenses, but the expenses were to apply only against the commissions. Now, that is likewise covered by this fifth clause that settlement will be made for commissions where they exceed advancements. Advancements there would cover both the guaranteed salary and the traveling expenses because the first clause states that the guaranteed salary may be paid in advance if requested, showing that it was contemplated that it might be advanced. If it is not advanced to him, the money accumulates to his credit. That being so, the application of this paper to this case is perfectly manifest. The plaintiff, being in the employ of the firm for five months, he gets a salary of $1000.00. It being agreed that the commissions were only $600.00 there was nothing to be added to the $1,000.00. It being further agreed that the traveling expenses were to be advanced and were to come out of his commissions, as the commissions amounted to $600.00 and they advanced $400.00, there remains a balance of $200.00. That is all the case as far as this contract is concerned.

"I can instruct the jury orally that the guaranteed salary is subject to no deductions on account of commissions and that if they believe from the evidence that $600.00 was earned in shape of commissions and $400.00 advanced for traveling expenses then they will find a verdict for the plaintiff for $200.00. That will cover my construction of the contract."

Pursuant to this instruction there was a verdict and judgment in favor of the salesman for $200.00.

This interpretation of the contract can be fairly based upon the language of the contract itself, as well as upon

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the testimony of one of the employer's witnesses, D. D. Staples, as indicated by this question and answer:

"The Court: The only question in this case is as to what was the contract between you and the plaintiff, or what was so much of it as bore upon the compensation which the plaintiff was to receive—what was the contract?

"A. The contract was that we were to guarantee him a salary of $200.00 a month and to advance him traveling expenses to apply against his commissions, not figuring for one instant that he wouldn't earn more in commissions—more than enough to pay his traveling expenses many times. No provision was put in as applying against his personal account because a man couldn't sell these and pay for his traveling expenses was a man that wouldn't be profitable to stay with us."

It is apparent, then, that the trial court construed the first clause as an absolute guarantee of a salary of $200 per month, and this without any reference whatever to the amount of the commissions which might be earned, although both parties were confident that the commissions would greatly exceed the amount of such guaranteed salary. Then, coming to the traveling expenses, the court declined to adopt the contention of either of the parties, but separating the expenses from the guaranteed salary account, held that the employer was under obligation to advance the necessary funds to cover traveling expenses, limited, however, to the amount of commissions which were actually earned, $600. Construing the contract thus, there was a balance in favor of the salesman which he has recovered.

While the case is not free from difficulty, we are of opinion to affirm the judgment for the reasons indicated by the learned judge of the trial court.

SIMS and BURKS, J. J., concur in result.

Affirmed.

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SIKLEK v. COMMONWEALTH.

(*Wytheville, June 15, 1922.*)

1. INDICTMENT.—Evidence Before Grand Jury—Self-Incrimination.

Error to Corporation Court of city of Newport News. *Affirmed.*

J. Louis Morewitz, for the plaintiff in error.

Attorney-General Jno. R. Saunders, *Assistant Attorney-General J. D. Hank, Jr.*, and *Second Assistant Attorney-General Leon M. Bazile*, for the Commonwealth.

The accused has been convicted of grand larceny, and is here assigning a single error, which can be best presented by the statement of facts certified by the trial court showing the only ruling to which he excepted.

"The court certifies that it appears from the evidence in this case that Max Siklek was tried in the Police Court of the city of Newport News on or about the 23rd day of August, 1921, on the charge of having bought stolen rope, knowing that same had been stolen, and was on that day dismissed on said charge by said court, but was held as a witness, under a bail bond of $250 for his appearance before the grand jury of this court, at the September, 1921, term, to testify on behalf of the Commonwealth in the case of C. L. Oliver, who had previously waived preliminary examination in said police court and had been at that time sent on to the grand jury on the charge of the larceny of said rope; that a summons had been duly served on said Siklek to appear before said grand jury and testify in behalf of the Commonwealth against the said C. L. Oliver, and that Siklek in response to said summons and in accordance with the terms of his said bond put in his appearance on the 13th day of September, 1921, and submitted himself to the further orders of this court; that Siklek was the

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first witness called and interrogated by the said grand jury, during their consideration of the bill presented against said C. L. Oliver, but at that time no presentment had been made, nor was there any under consideration against said Siklek; nor was it the intention of the attorney for the Commonwealth to place any charge or indictment before the grand jury against Siklek; that said Siklek was not warned by the court, nor does it appear that or whether he was warned by any member of the grand jury or by anyone else of his constitutional right to refuse to answer any questions or to give any information that would tend to incriminate himself; nor did the court know that Siklek was suspected of the offense for which he was afterwards indicated or of any other offense, or that any evidence which he might give would tend in any manner to incriminate him; and that the said grand jury, after questioning said Siklek and hearing other witnesses, upon the completion of its inquiry, of their own motion, returned a true bill against said Siklek and said C. L. Oliver, jointly, by having the attorney for the Commonwealth insert the name of M. Siklek in the indictment, after that of C. L. Oliver, charging them with grand larceny, in connection with the alleged theft of the rope hereinabove mentioned, the name of said Siklek also appearing at the foot of the indictment as one of the witnesses for the Commonwealth, having been so written on the presentment against C. L. Oliver as it was originally laid before the grand jury. The court further certifies that upon the arraignment of the accused, the said Max Siklek, on the indictment aforesaid, he demurred to the said indictment and moved to quash the same on the grounds hereinabove set out. But the court overruled said demurrer and motion to quash. To which ruling of the court accused, by counsel, excepted."

The error assigned is the overruling of the motion of the accused to quash the indictment.

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The accused relies upon a certain line of cases, in each of which it appeared affirmatively that a person while under accusation of crime had been compelled to go before the grand jury and to testify without warning being given to him that his testimony might be used against him, or of his constitutional right to refuse to testify. The whole argument for the accused here rests upon the suggestion that he has been compellel to incriminate himself.

Much has been written on the subject, but little need be said about it here in view of the certified facts in this case. At the time the accused was sent before the grand jury no indictment was contemplated against him, the charge that he had received the stolen goods knowing of the larceny had been previously dismissed, and the attorney for the Commonwealth had no intention to present any indictment to the grand jury against him; or did the court know that he was suspected of the offense for which he was afterwards indicted; nor does it appear that he was forced to answer any question which tended to incriminate him; nor that any such question was propounded to him, nor that any such incriminating evidence was given by him, nor that the indictment which was found was based upon his own testimony. So that, as it appears to us, none of the facts upon which the accused relies are shown to exist. The only facts which do appear are, that he went before the grand jury, being summoned as a witness to testify against C. L. Oliver, and that the grand jury, of its own motion, after hearing his testimony as well as that of four other witnesses, indicted him for the crime of which he has since been convicted.

That there have been cases in which the indictments have been quashed because accused persons were compelled to go before the grand jury and give incriminating testimony against themselves, is true, but we think that no case can be found in which an indictment has been quashed when

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there was no averment that the accused had been forced to give such incriminating testimony.

This case seems to be clearly controlled by the case of *Wadley* v. *Commonwealth*, 98 Va. 804, 35 S. E. 452, in which this is said: "Before his arraignment the prisoner filed two pleas, setting forth that the indictment against him was found upon illegal and inadmissible evidence, and praying that the same might, for that reason, be quashed. This motion was properly overruled.

"It is the policy of the law, in the interest of justice, that this preliminary hearing should be conducted with closed doors. This secrecy is not only consistent with, but essential to, the nature of the institution. The sufficiency of the proof cannot be inquired into to invalidate an indictment found by a lawfully constituted grand jury. The presumption is that every indictment is found upon proper evidence. If anything improper is given in evidence before a grand jury, it can be corrected on the trial before the petit jury.

"Grand juries are not generally selected on account of their legal acquirements, and doubtless often act upon evidence not strictly legal. If, however, the courts are to inquire into their proceedings, few indictments would come to trial without this preliminary. Bishop's New Criminal Procedure, Vol. 1, sec. 872, par. 5; 16 Conn. 457; *Ezra* v. *Beebe*, 17 Minn. 241; 3 Zab. (N. J.) 49; *Turk* v. *State*, 7 Ohio, 2 pt. 240; *Creek* v. *State*, 24 Ind. 151; *State* v. *Logan*, 1 Nev. 509."

In *Noll* v. *Dailey*, 72 W. Va. 520, 79 S. E. 668, 47 L. R. A. (N. S.) 1207, the *Wadley Case* is cited, and this quotation from *State* v. *Woodrow*, 58 W. Va. 527, 2 L. R. A. (N. S.) 862, 112 Am. St. Rep. 1001, 52 S. E. 545, 6 Ann. Cas. 180, appears: "It would be very bad practice—endless inconvenience—to have a full preliminary trial of competence of evidence before the grand jury in many cases. How far would the practice go? Does the inconvenience to the ac-

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cused justify the institution of such a practice? Are not his rights fully vindicated by his right to exclude improper evidence on the trial?" And it is said that however this question may be decided elsewhere, in Virginia and West Virginia such an inquiry cannot be made, and hence that no plea in abatement or motion to quash can be sustained.

The nature and extent of the privilege is well discussed in *State* v. *Duncan,* 78 Vt. 364, 63 Atl. 225, 112 A. L. R. 922; 6 Ann. Cas. 606; 4 L. R. A. (N. S.) 1148, note. This is a fair summary of the true rule in such cases: The fact of being summoned and appearing before a grand jury by a person not then accused of the crime under investigation is certainly not a violation of his constitutional rights merely because he was afterwards indicted therefor. While before the grand jury he could be compelled to testify like any other witness as to any matter that did not incriminate him, but clearly he could not be compelled to testify as to any matter that would incriminate him, and he has the option either to claim his privilege or to waive it. If he gives such incriminating testimony voluntarily, his constitutional rights are not thereby violated, for it is a general rule that when a witness has a personal privilege either to testify or to refuse to do so, and he testifies without interposing any objection, he will be deemed to have waived his right and held to have testified voluntarily. 28 R. C. L. 431; *State* v. *Shockley,* 29 Utah 25, 80 Pac. 865, 110 A. L. R. 654; *State* v. *Lloyd,* 152 Wis. 24, 139 N. W. 514, Ann. Cas. 1914C, 418. A grand jury has no power to compel a witness to testify, but only the court can exercise such compulsion, and if one declines to answer any question which he thinks will incriminate him, the grand jury can only report the matter to the court for proper action; and thus the witness has the opportunity to assert his rights and have them recognized and fully protected. There is an elaborate and instructive note on the general subject following the case of *Evans* v. *O'Connor,* (174 Mass. 287), in 75

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Am. St. Rep. at p. 318; *People* v. *Lauder*, 82 Mich. 109, 46 N. W. 956; *State* v. *Comer*, 157 Ind. 611, 62 N. E. 452; *State* v. *Campbell*, 73 Kan. 701, 85 Pac. 784, 9 L. R. A. (N. S.) 533, 9 Ann. Cas. 1208; *People* v. *Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 295.

In view of the facts appearing in this case and of the entire absence even of an allegation that the accused has been compelled to give incriminating evidence against himself before the grand jury, we should be going very far afield to hold upon a mere peradventure that his constitutional rights have been invaded. If called upon to speculate upon a subject about which we know nothing, we would say that the fair inference from the facts certified is that the prisoner did not testify to any incrminating facts, and that the indictment against him was found upon the testimony of the other witnesses who were examined. To sustain the contention of the accused would lead to this absurdity, that whenever a witness has been sworn and sent to the grand jury, and that grand jury or any other ever found an indictment against him, and he made a motion like this, upon the mere hint or suggestion that possibly on that occasion his constitutional rights were disregarded, the motion would be sustained, the indictment quashed and his immunity from punishment forever established notwithstanding his guilt.

It is suggested in the brief that a subsequent grand jury might indict such an accused person. It seems to us, however, that a motion might be made to quash such a subsequent indictment though founded upon the testimony of other witnesses, and that it could be supported by an argument equally as plausible as that by which the motion here made is supported. It might still be suggested that it was only because of his evidence before the first grand jury that some fact constituting a missing link in the evidence was supplied, without which no indictment would ever have been found against him. If the argument here made is

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sound, it would lead to the quashing of any later indictment which might thereafter be found against him, upon the mere suggestion that the accused had been compelled to supply the incriminating evidence in violation of his constitutional privilege. There being neither averment nor proof either of compulsion exerted against the accused or of his incrimination of himself the ruling is plainly right.

Affirmed.

SIMS v. CAPPER, ET AL.

(*Wytheville, June 15, 1922.*)

1. APPEAL AND ERROR.—Bill of Exceptions—Time of Signing—Identification of Evidence—Skeleton Bill—Code, sec. 6252.
2. EJECTMENT.—Paper Title—Adverse Possession—Evidence—Claim of Title.
3. IDEM.—Acreage—Identification of Land.

Error to Circuit Court of Arlington county.

Reversed.

James Sherier and *Amos C. Crounse,* for the plaintiff in error.

Crandall Mackey, for the defendants in error.

This is an action of ejection which resulted in a verdict and judgment for the defendant and the plaintiff in the court below, Laura B. Sims, brings error.

The material facts disclosed by the evidence, without conflict therein, are as follows:

The plaintiff proved a paper record title to the land claimed in the declaration, running back to the Commonwealth, and proved, by evidence, consisting of the testimony of surveyors and the descriptions contained in conveyances in the chain of title, that a portion of such land was in the possession of the defendants in error, who were the defendants in the court below, and will be hereinafter referred to as defendants.

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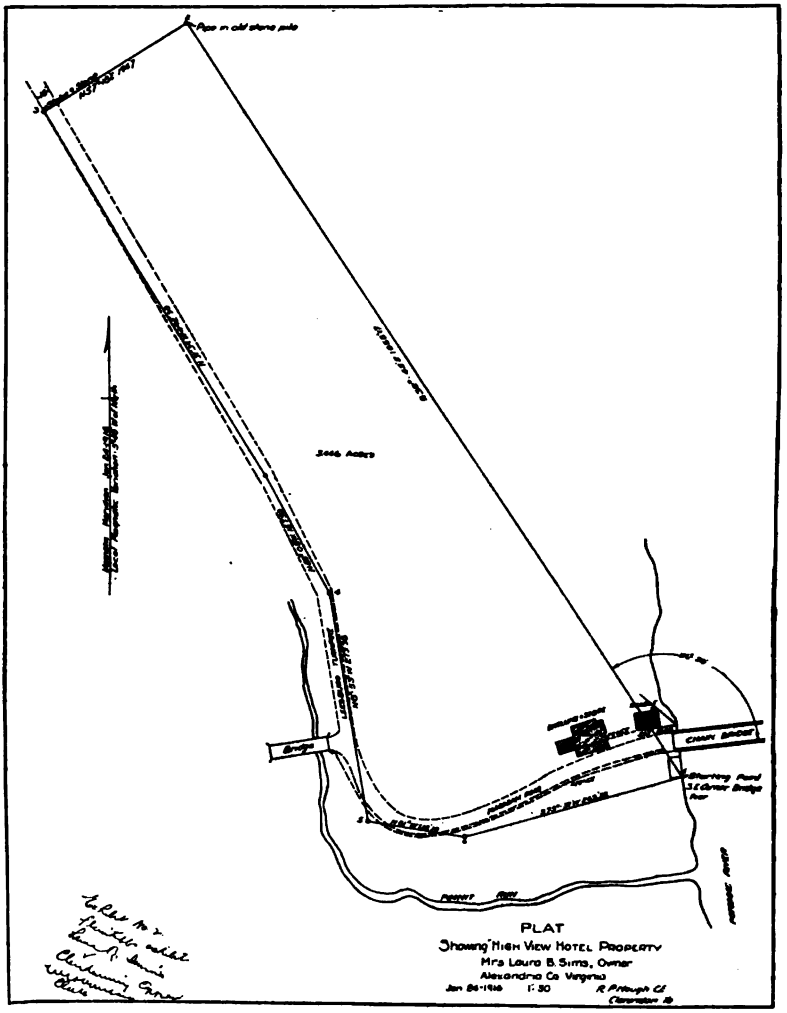
It developed that the defendant, Mrs. Woody, claimed to be the owner of the portion of the land in the possession of the defendants, Capper being merely her tenant.

The land claimed in the declaration is shown on the plat made by R. P. Hough, C. E., dated January 24, 1916, in evidence, reproduced below on a reduced scale, within the lines 1, 2, 3, 4, 5 and 6.



The dwelling and store, the portion of the stable, (the greater part being a shed to the stable), included within the lines of the plat, and the land lying between these two buildings, is the land in the possession of the defendants, title to which is involved in this action.

This action was instituted on February 3, 1919.

The defendant, Mrs. Woody through her tenant Capper. upon the death of her father-in-law, took possession of the said portion of the property, title to which is involved in this action, less than two years prior to the institution of the action, and held possession of it from that time, through her tenant Capper, up until the action was brought, claiming title thereto for life, with remainder to her children, under the will of her father-in-law, Edward T. Woody, which bears date November 7, 1917, and was probated in the District of Columbia. The will bears date a short time prior to the death of the testator.

This will, so far as material in this case, contains the following provision:

"I leave to my daugh*tern* law, Lillie I. M. Woody, during life, at death to revert to her children, the * * house at the south end of chain bridge in Virgin*a*."

The evidence showed that Edward T. Woody had actual, continuous possession of the aforesaid portion of land, for approximately forty one years next preceding his death; but the evidence is absolutely silent on the subject of his having ever expressly claimed any title to such land. The only evidence of any express claim of ownership is that one witness for the defendant testified that "he claimed the building, I knew."

It appears both from the testimony for the plaintiff and for the defendants, without conflict, that the building shown on the plat as a stable, was built, soon after the end of the civil war, by one James W. Walker, under the following permit or license in writing from the Mayor of Georgetown, namely:

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"Mayor's Office. Georgetown, December 30th, 1865. Permission is hereby granted to Mr. James Walker to erect a small frame house on the lot belonging to this corporation near the west and south side of Chain Bridge unless otherwise prohibited by the corporation. (Signed) H. Addison, Mayor."

This building was occupied by Walker as a dwelling place and bar-room until some time in 1876. The building was in fact located on what was supposed to be public property, except a small portion of the building which extended over upon the land afterwards acquired by the plaintiff; and there is nothing in the evidence to show that Walker ever claimed any title to any of the land on which this building was erected, or made any other claim than of the ownership of the building as on land belonging to the public, put there by the permission or license aforesaid.

It appears also from such testimony, without conflict, that the building shown on the plat as a dwelling house and store, was built by one Frank Scott, soon after the said building, now designated as a stable, was erected by Walker as aforesaid, under a permit or license from one George Hill, one of the predecessors in title of the plaintiff. Scott, prior to 1876, sold this building to the said Walker. There is no evidence tending to show that Scott ever claimed any title to or undertook to sell Walker any land. Walker thereupon took possession of this building also and retained possession of it until some time in 1876. There is no evidence that Walker ever claimed title to the land on which this building stood.

It appears from the same testimony above mentioned, and without conflict, that some time in 1876 Walker sold to the said Edward T. Woody, the aforesaid testator, under whom the defendants claim, both of said buildings. There is no evidence tending to show that Walker undertook to sell to the testator any land. Theerafter, as aforesaid, the testator had actual possession of such buildings continuous-

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ly until his death; but there is no evidence that he ever claimed any title to the land on which the buildings stood in that vicinity.

Further: The plaintiff introduced testimony, the truth of which was in no way controverted by the evidence for the defendants, that in the year 1916, the said testator presented to an agent of plaintiff the said permit from the Mayor of Georgetown and the following receipt from the said Walker, as the only title papers to the said two buildings, held by the testator, namely:

"Received from Mr. Edward T. Woody the sum of $500.-00 for a consideration to be expressed in a bill of sale of a two-story frame house with all appurtenances thereto belonging, standing at the end of the Falls Bridge in the State of Virginia on a piece of land by permission of Henry Addison, late Mayor of Georgetown, bearing date 1865, for which said house I am to execute a bill of sale when required by the said Edward T. Woody. Witness my hand and seal this 3rd day of October, 1876. (Signed) James W. Walker (By his mark) (Seal) Edward Woody, by his mark. John Lintler, witness."

That on this occasion the said testator made an appointment, with the witness for plaintiff who gave the testimony last above referred to, (and this also is uncontroverted), to return later and bring his attorney, which he did; and that after the testator and attorney had examined the record title of the plaintiff, the testator, in the presence of his attorney, admitted that he had no title to the land, and only claimed the buildings.

Other pertinent matters are mentioned in the opinion of the court.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court.

The first question to be disposed of is raised by a motion of the defendant to dismiss the appeal as improvidently

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awarded, on the ground that the bill of exceptions containing the evidence in the case was not signed by the trial judge within sixty days from the time at which the final judgment was entered, as required by statute (sec. 6252 of the Code).

On examination of the record we find that the final judgment was entered on April 21, 1920; that on June 18, 1920, within sixty days after the final judgment was entered, the trial judge signed a skeleton bill of exceptions in which the evidence both for the plaintiff and the defendants was referred to in the usual manner, to-wit, by the provisions, respectively," (here insert the evidence for the plaintiff)" and "(here insert the evidence for the defendant);" and on the same date the judge made the following endorsement, on the back of a typewritten report of all of the evidence in the case, namely: "Evidence in case of *Laura B. Sims* v. *Clendenning Capper*. Given under my hand and seal this 18th day of June, 1920," and signed this endorsement. This was sufficient to identify the evidence referred to in the skeleton bill of exceptions, and the clerk in copying the record, was fully authorized thereby to have copied this evidence into the skeleton bill of exceptions. This, we think, brings the case within the requirements of the statute.

In our view of the case it will be necessary for us to deal with only one of the questions presented for our decision by the assignment of error, and that is this:

2

1. Have the defendants shown any title to the land in controversy acquired by them, or their predecessors in title, by adverse possession?

The question must be answered in the negative.

The plaintiff has shown a perfect record paper title, traced back to the Commonwealth. The sole defense of the defendants is that they and their immediate predecessors in title have acquired title to the land in controversy by ad-

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verse possession. The verdict of the jury, being for the defendants, it cannot be disturbed on appeal if there was any evidence before the jury sufficient to show such title by adverse possession.

It is, however, elementary, that, however long the mere possession, no title by adverse possession can be acquired unless the possession be accompanied by claim of title for the statutory period.

The claim of title is as essential as the possession, in order to constitute adversary possession; and the burden of proof to show both is upon those asserting the acquisition of title by such possession, whether with or without color of title. A mere naked possession, without claim of right, no matter how long continued, never ripens into a good title, but is regarded as being held for the benefit of the true owner. *Kirk* v. *Smith*, 9 Wheat. 241, 6 L. ed. 81, 92; *Creekmur* v. *Creekmur*, 75 Va. 430; *Kinchelce* v. *Tracewell*, 11 Gratt. (52 Va.) 587; *Reusens* v. *Lawson*, 91 Va. 236; *Shank* v. *Lancaster*, 5 Gratt. (46 Va.) 110; *Drumright* v. *Hite*, 2 Va. Dec. 465; Sedgwick and Wait on Trial of Title to Land, sections 745, 755, 756.

The claim of title need not be expressed; it may be inferred from conduct which is unequivocal, and is inconsistent with any other reasonable inference, as, for example, possession held under a deed purporting to convey title is presumed to be with claim of that title, (*Va. Coal & Iron Co.* v. *Hylton*, 115 Va. 418); whereas possession with mere claim of "ownership of the improvements" is held to be evidence of the absence of the requisite claim of right and title "to the land" upon which to base adverse possession. (Sedgwick & Wait on Trial of Title to Land, sec. 756, citing *Davenport* v. *Sebring*, 52 Iowa, 367, 368); and where the possession is originally taken under a mistake or misapprehension as to the true boundary, this is *prima facie* evidence of the absence of any hostile claim of title, which has to be overcome by proof of the existance of a specific

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intention to claim a hostile title to the land. (*Christian* v. *Bulback*, 120 Va. 74, 13 Va. App. 133; Sedgwick & Wait on Trial of Title to Land sections 759, 760). But however sought to be established, whether by showing an express claim of title, or by proof of conduct from which the inference of claim of title is sought to be drawn, the fact that the possession was accompanied by an actual, hostile, claim of title must be made manifest by the evidence. *Haney* v. *Breeden*, 100 Va. 781, 784 and autorities above cited.

In the instant case the possession of the defendants themselves was accompanied by claim of title; but that possession covered a period of less than two years. To complete the statutory period requisite to obtain title by adverse possession it was necessary to tack the period of the possession of the defendants to the possession of their immediate predecessor in title, Edward T. Woody. This could be done, and would more than complete the requisite period of possession, if the possession of the latter was accompanied by claim of title to the land, for such possession alone continued unbroken for some forty-one years. But there was an entire absence of any evidence before the jury, of any probative value, tending to establish the fact that Woody's possession was accompanied by any claim of title to the land. The witnesses on the subject admit that they never heard Woody make any express claim of title to the land. One of the witnesses does say that he knew that Woody "claimed the buildings." This of itself, as we have seen, instead of being evidence tending to show a hostile claim of title to the land, was evidence to the contrary. It tended to show that Woody did not claim any title to the land. The conduct of Woody, shown by the testimony for the defendants, is, to say the least, equally consistent with his mere claim of ownership of the buildings under a revocable license from the true owner of the land on which they stand, as with any claim of ownership of the land. And the circumstances under which the buildings were

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first erected, and with respect to when and from whom Woody acquired the possession of the buildings, as shown by the testimony for the defendants themselves, negative the idea that Woody's possession thereof was ever accompanied with any claim of title to the land. Then, too, there is the uncontroverted testimony for the plaintiff that Woody, only a short time before his death, admitted that he claimed no title to the land, but "only claimed the buildings."

Further: The will of Woody, under which the plaintiffs claim title, when read in the light of the other evidence, furnishes convincing proof that the testator, in truth, did not undertake to devise to defendant, Mrs. Woody, any of the land in controversy, or even to bequeath to her the dwelling and store building thereon, but merely the stable building. There were two separate buildings on the land in controversy, which were in the possession of Woody up until his death; one the stable, at the south end of the Chain Bridge, in Virginia, the other the dwelling house and store, which was not at, but some distance away from the south end of such bridge. He attemped by his will to bequeath only one building, to-wit, the "house at the south end of Chain Bridge, in Virginia." And the bequest was of the "house" merely. As aforesaid, it was not a devise of any land. This, of itself, when considered in the light of the other evidence in the case, was evidence of the absence of any claim of title on the part of the testator to any of the land in controversy.

The evidence, without conflict, presents a case of mere naked possession on the part of Woody, without claim of right to the land.

The verdict and judgment under review must, therefore, be set aside and annulled.

2. Before concluding this opinion, we will mention certain positions taken in the brief for the defendants.

It is argued for the defendants that the land claimed in the declaration, upon the survey by Hough, as per the plat

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in evidence, overran the quanity of 5.22 acres, called for in the deeds in plaintiff's chain of title, by 9844 square feet, and that the jury might have found that the land claimed by the defendants was embraced in this excess quanity of land.

There is no merit in this contention. It is well settled that the acreage called for by the title papers, while a circumstance to be considered in identifying the land, is the least reliable of all the evidences of its true location. Where the boundary lines called for in the writings evidencing the title are located on the ground in accordance with such calls, those lines fix the location of the land, irrespective of the acreage called for in such writings.

It is stated in the brief for defendants that "no surveyor, or lawyer, or title examiner, or other person was ever put on the stand to testify as to the identity of the land in controversy, or the 5.22 acres, with the other land with which the chain of title started." The plaintiff introduced two surveyors as witnesses, who testified to the location on the ground of the land claimed in the declaration as conveyed to the plaintiff from her immediate grantor; but it is true that those witnesses did not testify on the subject of tracing that land back, as the same which was included in the preceding deeds in the plaintiff's chain of title; and there was no other oral testimony attempting to do this. It is further true that ordinarily some oral testimony is necessary in aid of the descriptions in various deeds in a chain of title, in order to identify the land conveyed by the respective deeds as being located in the particular place in question. However, it so happens in the instant case that the descriptions of the land conveyed, contained in the respective preceding deeds in the plaintiff's chain of title, are, by the terms employed, so connected with the descriptions of the land conveyed by the deed from the plaintiff's immediate grantor, that it is apparent from a mere reading of such preceding deeds that they embrace the same land.

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For the reasons above stated, the judgment under review will be reversed; and, the facts before us being such as, in our opinion, to enable us to attain the ends of justice, we will enter a final judgment for the plaintiff, to the effect that the plaintiff is the owner of an estate in fee simple in, and that she recover of the defendants, the land in controversy, consisting of the dwelling and store building and that portion of the stable building, included within the lines of the aforesaid plat filed in evidence, and also the land lying between those buildings, with costs; without prejudice, however, to the right of the defendants, if they so desire, to apply to the court below for an allowance for improvements, subject to an assessment of the damages of the plaintiff, and for a suspension of the execution of the judgment, under chapter 225 of the Code, the proceeding, if had, to be governed in all respects by the provisions of that chapter, and for that purpose the judgment entered by us shall be regarded as if it had been entered by the court below.

Reversed and final judgment.

SORROS v. COMMONWEALTH.

(*Wytheville, June 15, 1922.*)

1. APPEAL AND ERROR.—Bills of Exceptions—Time of Signing—Code, secs. 6252, 6253.

Error to Circuit Court of Wise county.

Dismissed.

Kilgore & Dotson, for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

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SIMS, J.:

We are met on the threshold of this case by the motion of the Attorney General to dismiss the appeal for lack of any record accompanying the petition for the writ of error.

The final judgment in this case was entered in the court below on April 26, 1920. The bills of exceptions were not signed by the trial judge until June 29th, which was more than 60 days after the entry of the final judgment. We find nothing in the record to explain this delay so as to bring the petitioner for the writ of error within the requirement of the statute law, (Secs. 6252, 6253), that the bills of exception, or certificates, must be signed within 60 days from the time at which the final judgment is entered. The bills of exception accompanying the petition are therefore no part of the record before this court. All of the assignments of error insisted upon depend for their consideration upon the evidence. The appeal must, therefore, be dismissed as improvidently awarded. *Bragg* v. *Justis*, 129 Va. 354, 22 Va. App. 298, 301; *Harley's Case*, 24 Va. App. 364; *Kelly* v. *Trehy*, decided at this term.

Dismissed.

STARK, ET ALS., *v.* STARK, ET ALS.

(*Wytheville, June 15, 1922.*)

1. EQUITY.—Parol Contract—Personal Services—Cancellation—Failure of Consideration—Interest in Real Eestate and Personal Property—Evidence.

Appeal from Circuit Court of Culpeper county.

Affirmed.

Grimsley & Miller, for the appellants.

E. H. Gibson and *Waite, Perry & Nottingham* for the appellees.

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BURKS, J.:

This is one of those unfortunate family differences that sometimes find their way into the courts and which the courts find it so difficult to solve in accordance with legal and equitable principles and at the same time do justice between the parties. It is one of a series of four suits, all more or less connected with the same subject-matter, and the evidence in two of which is reproduced in the record of this case. It is a suit brought by a father and mother against their four children, and, in order to get a clearer understanding of the situation, it will be necessary to make a statement of the facts prior to and leading up to the present litigation.

H. Mason Stark and his wife, Bettie C., were married in November, 1870, and the next year he worked on the farm of his father-in-law, in Hanover county, where the first child was born in December, 1871. His father had died a few years previous to that time and there was assigned to him a tract of 132 acres of land, and some years thereafter he acquired 110 acres additional, making a total holding of 242 acres in 1901. This 132 acres of which we are now to speak is located in Culpeper county and is described as very poor, with no improvements of any kind on it, "nothing but weeds, huckleberry bushes and grape vines," or as put by another witness, "nothing on God's earth on it except pines, bushes &c." Stark was then in his early twenties. He was a strong, industrious, sober young man, with a resolute will, and he determined to move upon this unpromising piece of land, make a home for himself and family, and extract from it a living. He left his wife and child with her father the next year and went upon the 132 acre tract, and cut and hauled the logs to the sawmill, and had them sawed, and built upon it a dwelling house 24 by 16 feet, "the best his means would afford," and also "put up some temporary outbuildings out of logs, temporary henhouse and a few other things." To this home in the wilder-

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ness Stark carried his wife, who was not less resolute and courageous than her husband. Her father aided them in procuring farming implements, and moderate household equipment, and all of the personal property then and thereafter stood in her name. With this equipment, the young couple who had pledged themselves to take each other "for better or for worse" set to work to make a home and rear a family. We hear but little of their struggle during the intervening years, but after the lapse of thirty years from their marriage, we find that they have had seven children, three of whom had died, that the surviving children had all received such education as the schools of the neighborhood afforded, that the personal property on the farm had greatly increased in value, and that all of the children were still at home and together with the father and mother constituted a happy and united family. Such was the situation in 1901.

At this time the family consisted of Mr. and Mrs. Stark, and four children, Bruce, Lottie, Frank and Elba. Mr. Stark was somewhat crippled by rheumatism as a result of his hard life and exposure, was given to occasional outbursts of passion and intemperate language, and like many another pioneer had the gift of "cussing." The family, however, were accustomed to these frailties and did not permit them to mar their peace and happiness, but lived "harmoniously and contentedly together." At this time, Bruce, the oldest son, then about twenty-three years of age, seeing no future before him on the old farm, announced his intention of going West to better his condition. His mother describes the situation thus: "He said that he was not making anything there. He was very delicate, I had to nurse him like a baby, and of course, like a mother would, I was afraid if he would go away from me, or away from home, he would die, and just a mother's love, I was willing to give him almost anything to keep him there." His father and mother were anxious to have him remain at home, and offered him inducements to do so, and as a result of these

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negotiations an oral agreement was entered into between the father and mother, on the one side, and Bruce Stark, on the other, and in pursuance of that agreement he remained on the farm. What were the terms of that agreement is the most controverted fact in this case. The father and mother insist that the agreement was that Bruce should have possession immediately of all the personal property, including the farming implements, and operate the farm. They speak of it as going into partnership in conducting the farm; that Mr. Stark was to work on the farm as he had always theretofore done; that Bruce was also to work on the farm; that he was to have charge of the financial affairs for the concern, and after furnishing a comfortable support for the family and the payment of all taxes and costs of supplies and other necessary expenses incident to the proper management and conduct of the farm, Bruce was to have any profits that arose from the conduct of the farm. They insist that no one was present when this verbal contract was entered into except the parties thereto; that no time was specified for its continuance and nothing was said about permanent improvements. Mrs. Stark testified that only the parties to the contract were present, that some of the children were at school and others too small to attend school. On the other hand, Bruce Stark insists that the contract was a family arrangement and that all the members of the family were present when it was entered into; that under the terms of the contract the personal property on the place should become immediately his; that he was to conduct the farm and furnish a support for his father and mother and such members of the family as remained there, that his father was to work on the farm whenever he felt like it, without pay, and that the arrangement was to continue during the life of his father and mother and the survivor of them, and that upon the death of the survivor the property was to be divided among their children except that he was to have a preferred lien for any permanent im-

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provements he might put on the place. We do not need to stop to consider this contract any further at present, but will advert to it later. It is mentioned now simply to show what the contention of the respective parties was with reference to this contract.

Whatever may have been the true contract between the parties, it is conceded in the application for an appeal that the parties "all lived up to the spirit of their contract; things moved smoothly, and they lived harmoniously and contentedly together up until the year 1914." The only disagreement between the parties on this question is that Mr. and Mrs. Stark say that the friction began in 1913. In the spring of the year 1914, Mr. Stark was in a highly nervous condition and became greatly excited and agitated over what he seemed to think was improper conduct on the part of Bruce Stark, and especially about laying off some corn rows. As a result of his excitement and consequent conduct, his son, Bruce, swore out a warrant of lunacy against him and the commission met and examined into his sanity. The justice of the peace on the commission was a brother of Mr. Stark, and one of the doctors was the family physican. Mr. Stark himself admitted that he was in a serious nervous condition and needed treatment. The commission found him to be insane and committed him to the Western State Hospital for treatment. He was accompanied to the hospital by his daughter, Elba, one of the defendants in this suit, who made frequent visits to him while there. He conceived a violent prejudice against his son, Bruce, who had sworn out the warrant of lunacy, and on one of the visits of Elba he said to her that when he got out of the asylum he was going to sue Bruce. His son, Frank, also visited him while in the asylum, and he appealed to Frank to get him out of the asylum, but Frank refused to make any effort in that behalf on the ground that the doctors knew better what to do with him than he, Frank, did. After he had remained in the asylum for nearly two years,

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he made his escape and returned home, and Bruce promptly notified the asylum authorities that he was at home. This was in 1916. The superintendent of the asylum advised Bruce to let him remain as on furlough, but to watch him to prevent any violence on his part. He remained at home from 1916 to 1918 without any manifestation of violence on his part, or apprehension on the part of his wife. But the conduct of his son, Bruce, was a constant and increasing source of irritation to him. He felt that he had a right to manage the farm according to his notion, and that Bruce was interfering with that management, and in 1918 he applied to the Circuit Court of Culpeper for an injunction to restrain Bruce and his brother, Frank, from interfering with him in the management and conduct of the farm. At that time he had not been discharged from the asylum. The circuit court refused the injunction. Shortly thereafter he applied to the superintendent of the asylum for his discharge, which the superintendent declined to give. He thereupon instituted proceedings in the Circuit Court of Culpeper county to be discharged on the ground that he hed been restored to sanity. When he made this application, Bruce, with his counsel, went to see the superintendent, and asked him about the mental condition of Mr. Stark, and the superintendent stated that he was still insane, but that the State provided him no funds for resisting applications of that character, and that he intended to let the application go by default. Bruce then stated to the superintendent that if that was his opinion, he, Bruce, would employ counsel and furnish the means to resist his discharge. This resistance was put upon the ground of protecting Mr. Stark against himself and his family against dangers that might be apprehended from him. But in the petition for this appeal it appears that "Bruce Stark, his brothers and sisters, don't desire him to be discharged just to engage in useless litigation with petitioner or to squander the estate which Bruce Stark had built up for him." After

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a full hearing of testimony on the subject, Mr. Stark was discharged by the circuit court as restored to sanity.

The father of Mrs. H. M. Stark had died sometime prior to 1901, and there was coming to her from her father's estate about $2,500. This money, or a large portion of it, had been paid over to the agent of Mrs. Stark, Mr. A. J. Chewning, in the city of Richmond, who had invested it for her benefit. Soon after the contract of 1901 was entered into, she gave Bruce $150. She also advanced to him $111 to pay a debt which he was to pay for his father under the contract of 1901. About that time Bruce wished to purchase some land and begged of his mother the loan of $900, which, after some chaffing between them, she finally made, but took no evidence of the promise to repay it. In 1905 she still had $1100 invested by her cousin in Richmond, and she says that Bruce insisted that it was not well invested and besought his mother to let him have this $1100. She finally consented to let him have it, she says to invest for her, and he says as a loan. At all events, it is conceded that he got the $1100, and that no written evidence thereof was given. The interest on these two sums of money he paid from time to time as his mother wished it, until finally, in 1917, according to her testimony, she demanded the return of her principle, and she testifies that greatly to her surprise Bruce stated that he had already paid her the principal and owed her nothing. In January, 1916, Bruce conveyed all of his property, real and personal, to his wife, whom he had married in 1915. This deed was not put to record until August, 1917. After Bruce denied owing any part of the $2,000, suit was brought by Mrs. Stark against Bruce Stark and his wife, alleging the existence of the debt, and insisting that the money had gone into the land which he had conveyed to his wife, and if not, at least the deed to his wife was without consideration, and fraudulent in law, and that said deed should be set aside to pay the debt due to her. Bruce and his wife filed a joint answer to

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the bill in this case, in which they ignored the specific charges made in the bill, and simply denied that Bruce was indebted to Mrs. Stark in any sum, in any manner, at the time of the institution of the suit, or that the deed made to his wife was voluntary. They then specifically rely upon the statute of limitations as a bar to the claim. Counsel in that case, who were the same as the counsel in this, agreed that the entire record in that suit might be read in evidence in the present suit, and the entire record in the present suit might be read in evidence in that. There is copied into the record of this case the bill and answer in the suit of Mrs. Stark against Bruce and his wife, and the testimony of Mrs. Stark and of Bruce Stark, but no other part of the record or evidence is copied into this record.

What disposition was made of the case does not appear from the record before us, but in the belief of counsel for the appellees it is stated that the suit of Mrs. Stark against Bruce and his wife went off on the plea of the statute of limitations. The plea of payment set up by the answer of Bruce and his wife does not seem to be sustained by such of the evidence as is before us. No receipts are filed, and no evidence outside of the testimony of Bruce and his brother and sisters is given of such payments. His brother and his sisters testify that they had heard their mother say that Bruce had repaid her, but they give no details. In his testimony he was asked when this money was paid to his mother, and he replied "sometime prior to 1910," and asked how he paid it, he replied, "I don't know. I could tell you how I paid it but my papers have been molested and tampered with, and my records have been destroyed. I paid her one sum of $1100." No other evidence of the payment of the $1100 is presented by the record, except a stub from a check book. The check is not produced, nor evidence showing that any such check was ever drawn, or ever received by her. When asked if he remembered the amount of any check that he gave her on the principle ex-

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cept the check for $1100, he answered, "I don't know that I could answer that correctly. I don't remember positively. I paid her with check or cash. I paid her at different times prior to that time." But he could furnish no memorandum of any such payments. Finally, as to the $900, he was asked and answered as follows: "Q. Now, you have not been able to find out how the $900 was paid out, I believe?" "A. I stated that I paid part of it in cash and possibly all in cash. I cannot say positively." But no voucher of any kind was produced in evidence of such payment. It would seem, therefore, that that case went off, as stated by counsel for the appellees, on a plea of the statute of limitations.

The present suit was brought by H. Mason Stark and Bettie C., his wife, against their four children. The bill sets out most of the facts hereinbefore stated, except the result of the suit of Mrs. Bettie C. Stark against Bruce Stark and his wife, which was still pending, though the fact of the loan and its non-payment was set out. It sets out the oral contract of 1901 and speaks of it as a partnership agreement which was to be conducted in the name of H. M. Stark and son. The complainants claim that the contract was that the personal property on the place, which belonged to Mrs. Stark, and the farm, should be turned over to Bruce Stark to be operated by him under the firm name of H. M. Stark and son; that H. M. Stark was to work on the farm as he had previously done, and to direct the work of the farm, while Bruce Stark was to work on the farm and to have the direction of the outside affairs, including keeping the bank account, buying and selling of cattle, and the like, and out of the proceeds of the farm, under this contract, the family were to be supported and maintained, and after deducting such support and maintenance and all operating expenses, the profits arising from the operation of the farm were to be the property of Bruce Stark. Nothing was said as to any permanent improvements placed upon the property by Bruce Stark, nor

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as to the duration of the contract. The bill also sets out what Bruce Stark claimed to be the contract and the particulars in which he had failed to perform his obligations, if his view of the contract was sustained. The bill prayed that the true terms of the verbal contract between the complainants and Bruce Stark should be ascertained and declared, and the complainants' rights and interest in the real estate and personal property be established; that the defendant be perpetually enjoined and restrained from claiming any right, interest or title in the real estate and personal property turned over to Bruce Stark, as aforesaid; or if the court should be of opinion that the appellants acquired an interest or right in the real and personal property aforesaid under the terms of the verbal contract between them and complainants, that the said contract might be annulled and set aside because of the breach and abandonment thereof by Bruce Stark, and his failure and neglect to fulfil the terms thereof; or that a partnership be declared in said real and personal property, and because of the impossibility of having the operations of said partnership continued that the same should be dissolved under the direction of the court, and for further relief.

The bill was answered by Bruce Stark and Frank Stark, in which they deny that the contract was as set up in said bill, and on the contrary allege that the contract was that the tract of 242 acres of land was to be turned over to Bruce Stark; that Bruce Stark was to manage and control the property as his own; that H. M. Stark was to assist him to the extent that he should labor on said farm without hire, but the management and control thereof rested solely in Bruce Stark; that the said Bruce Stark was to support the plaintiffs and such of their children as might desire to make their home with them in a manner becoming their means and station in life; that the personal property on said farm was to become at once the absolute property of the said Bruce Stark, and that all the revenues derived

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from the operation of the farm after deducting the expenses of operating the same, and the support of the family, was to be the absolute property of the said Bruce Stark as compensation for his undertaking, and that this contract was to continue during the lives of the complainants and the life of the survivor, and upon the death of the survivor the real estate embraced in the contract was to go to the children of the complainants, subject to a lien in favor of Bruce Stark for any permanent improvements he might put upon the land.

It will be observed from a comparison of the different views of the parties as to what the contract was, that the chief differences were that Bruce Stark claims that he was to have the sole management of the farm, be the absolute owner of all the personal property; that the contract was to continue during the lives of the complainants and the life of the survivor of them, and upon the death of the survivor that the property was to go to the children of the complainants, subject to a lien in favor of Bruce Stark for any permanent improvements he might put upon the place. These claims of Bruce Stark are denied by the complainants. In addition to the allegation above as to what the terms of the contract were, the respondents give their version of the insanity proceedings, deny that Bruce has in any way failed to perform his part of the contract, admit that the respondents have moved off of the place under an agreement between counsel for both sides that such removal was to be without prejudice to their rights, and respondents offer to continue to perform the contract on their part and set forth specifically the personal property which Bruce Stark says he is willing to provide the complainants with; but they specifically and particularly insist "upon those provisions of his contract which provide that he shall have a lien on said land for the value of the permanent improvements placed thereon by him, and at the death of the said H. M. Stark and Bettie C. Stark the said real estate is to be

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divided between their children, subject to the aforesaid lien." Respondents then pray that an injunction may be awarded them against the complainants, enjoining the complainants from disposing of said real estate or placing any lien thereon, and to that end, if necessary, that their answer may be read as a cross-bill.

The testimony in the case was given *ore tenus* before the trial court. On behalf of the complainants there were examined H. M. Stark and his wife, Bettie C. Stark, Dr. DeJarnette, and several neighbors as to the comparative condition of the farm in 1901 and now, and one or two other witnesses upon points not very helpful to the solution of the present differences. On behalf of the defendants, all four of the defendants testified and two other witnesses, whose testimony is not of sufficient importance to require special comment. There was also read into the record the testimony of H. M. Stark and Bettie C. Stark in the suit against Dr. DeJarnette to establish the sanity of H. M. Stark and the bill and answer in the suit of *Bettie C. Stark* v. *Bruce Stark and wife,* hereinbefore referred to, and the depositions in that case of Bettie C. Stark and Bruce Stark.

It would be impossible in an opinion of reasonable length to give in detail the testimony of the different witnesses. It may be said in general that the witnesses on both sides are interested parties, and that the testimony of the complainants fully sustains their view, and that of the defendants the view of Bruce Stark. The testimony of Dr. DeJarnette is valuable, not only from a professional standpoint, but also from a common sense view. From a professional standpoint we learn what he means by insane as applied to Mr. Stark, as appears from the following question and answer: "Q. The idea that he has been persecuted is one of the symptoms of epilepsy, is it not?" "A. No, sir, it may be but it is not necessarily so. It is a paranoidal trend, you know, and in any form of insanity

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we very often find persecutory ideas; but epileptic insanity is usually impulsive, very irritable, and very variable; their conduct is very varied. Sometimes they will be apparently normal for a long time, and then these outbursts of abnormal mentality will occur." In other words, it is not a case of insanity with lucid intervals, but rather of sanity with outbursts of abnormal mentality.

Testifying unprofessionally, he gave some very wholesome advice. He said: "If there is such a thing possible as making up, they ought to make up, and I think it is a shame that they do not, and if they can make up it would be a God's send to the family to do it." On the subject of his sons returning to live with him, Dr. DeJarnette said: "I think the old gentleman is high strung and liable to become easily irritated and violent in his manner, and certainly in his talk, and I bielieve if his sons went back to him they would have the same trouble * * *. If the old man is sane and it is found out that he is sane, and by removing these boys he can get along better, it seems to me they ought not to be with him. That is my notion. Just common sense about the thing." In answer to a further question on the same subject he says: "If it was my father I would not hold him to it. I would let him go."

The following questions and answers show Dr. DeJarnette's estimate of the character of Mr. Stark: "Q. He is not a man who would be imposed on, is he?" "A. Not if he thought that he was, not a minute." "Q. He is more likely to be aggressor then—" "A. (Interrupting) Well, I have always thought he was a man who wanted to do what was right. I believe that about Mr. Stark. I don't think he would willingly do what he thought was wrong." "Q. But an excitable, nervous man is usually an aggressor?" "A. Yes, he would be the aggressor when he thought his rights were imposed on." "Q. I have a little bit of that—" "A. Yes, he would lead the attack. He would not have

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anybody attack him." "Q. And he would not tolerate for a moment any affronts?" "A. I don't think he would." "Q. He would not tolerate it as much as an average man would?" "A. I don't think he would." "Q. And would be much more apt to take offense at trivial matters than the average man?" "A. Well, yes, but I got along with Mr. Stark very well. Splendidly most of the time, and I was keeping him in the hospital all the time."

We cannot say that the inconsistencies or improbabilities on either side are such as to turn the scale against it. Both sides have testified with apparent honesty of purpose, but the acts and declarations of each have been viewed from a different angle by the other. If the contract be as claimed by Bruce, it is certain that it cannot be carried out in its integrity. It is impossible according to admitted facts for him to live on the place and furnish the support contracted for. These old people find themselves in great distress in their present situation. They have lived on the place and worked hard for the last fifty years, and deny that they have made any contract whereby they have parted with the ownership of their home and personal property. H. M. Stark expresses his view of the situation when, in answering a question as to what occasioned his excitement at the times mentioned, he said: "Well, to think my property had been taken away from me by a son even if I had entered into such a verbal agreement, and that with a poor old crazy father trying to take advantage of him! If that had been my father, as soon as I found out he was dissatisfied, I would have dissolved the partnership with him." Later on, when he was asked if he entertained any ill-will towards his sons, he replied, "No," and then the mere suggestion of their relationship seemed to evoke from him a wail of anguish as touching as that of David over Absalom, and he exclaimed: "Would to God I had died before I ever came to this."

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The case, as we have stated, was heard in the trial court on the oral testimony of the witnesses. The court saw the demeanor of the witnesses on the stand and heard them testify. Moreover, it was the same court that had seen and heard the witnesses in the proceeding to have H. M. Stark adjudged to be sane. That court found against the appellants in the present suit. Certainly that finding is entitled to great weight in this court and will not lightly be set aside. *Barnard* v. *Barnard*, 132 Va. —, 25 Va. App. 199. The trial judge delivered a written opinion in the case, and it is said in the petition for the appeal that the opinion shows that the trial court found in favor of the appellants, and then decreed in favor of the appellees. The decree of the court was simply its interpretation of its opinion, and a finding upon the facts in favor of the appellees, and is the authoritative and effectual opinion and judgment of the court. The decree appealed from restores to Mrs. Stark the personal property substantially as it was delivered to Bruce Stark in 1901. It denies to appellants any vested interest in the tract of land, delivers the same to H. M. Stark to be held by him in fee simple, and enjoins the appellants and Frank Stark (since deceased) from asserting "claims of any kind or nature to the right, title and interest of H. M. Stark in the said farm of 242 acres, more or less except as to the claim for permanent improvements allowed Bruce Stark under this decree." There is abundant evidence in the record to sustain the decree except as to the permanent improvements. Although the appellees have not relied on the statute of frauds, they had title and possession of the property in controversy, and this title and possession the appellants seek to supplant by proof of a parol contract fully performed by Bruce Stark, which contract is set up in the answer of Bruce Stark and Frank Stark. In this answer respondents pray "that an injunction be awarded against the plaintiffs, enjoining them from disposing of

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said real estate or placing any lien thereon, and to that end, if necessary, this answer may be read as a cross-bill." The answer is in the nature of a bill for the specific performance of the said parol contract. The burden of proving the parol contract alleged was on Bruce Stark and those claiming the benefit of said contract. Not only so, but it was necessary that such evidence should be clear and convincing. *Pierce* v. *Catron,* 23 Gratt. (64 Va.) 595; *Ford* v. *Euker,* 86 Va. 75; *Henley* v. *Cottrell,* 101 Va. 70; *Plunkett* v. *Bryant,* 101 Va. 814; *Cranes Nest Coal Co.* v. *Va. Iron &c. Co.,* 108 Va. 862, 2 Va. App. 671. The trial court, which saw and heard the witnesses testify, has held that the evidence does not measure up to that standard, and in that conclusion we concur. The material facts to sustain the alleged contract are stated positively by the appellants in their testimony, and are equally as positively denied by the appellees in their testimony, and there is no other testimony on the subject in the record. It would be useless, therefore, to discuss the details of the testimony as to acts done or omitted in the performance of the contract, or the conduct of the parties towards each other.

The decree of the trial court upholds the contention of the complainants, H. Mason Stark and wife, in all respects except as to the question of permanent improvements. The appellees deny that anything was said about permanent improvements, or any lien therefor. It is not disputed that some permanent improvements were placed upon the land, but it is not clear from the testimony in this case that Bruce Stark is entitled to credit therefor, yet it seems but just and equitable that they should be allowed to him if the appellees are allowed to recover the land. These improvements were manifestly placed upon the land by Bruce Stark under circumstances indicating that he was to have the benefit of them, and it seems but fair and equitable, under the peculiar circumstances of this case, that he should have credit for such permanent improve-

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ments as he put upon the land, and that the course directed by the trial court was the proper course to be pursued. Upon the whole case, in view of the finding of the trial court upon conflicting oral evidence heard by it, and of the failure of the appellants to sustain the burden of proof resting upon them, we are of opinion to affirm the decree of the Circuit Court of Culpeper county.

If, perchance, we have reached a wrong conclusion in this case, and the decree of this court unwittingly causes a pecuniary loss to Bruce Stark and his brother and sisters, they must realize that their loss is the gain of a father and mother who have passed the allotted age of three score and ten, and that the loss so sustained is not to be compared to the debt which they owe to their parents who have given their best years to the rearing and maintenance of their children under very trying and difficult conditions.

Affirmed.

SIMS, J., dissenting:

I find myself unable to concur in the result of the majority opinion in this case. With much that is so well and forcibly said therein, and especially with the holding on the subject of the refusal of the granting of specific performance of the contract, I do concur. But it seems to me that the very same considerations upon which specific performance of the contract is denied should lead to the denial of the rescission of the contract. The very same character of proof is required in order to obtain either relief; and there is the same kind of defect in the proof on the part of the appellees, seeking rescission, as there is on the part of the appellants, seeking specific performance of the contract, in the instant case. The denial of all such relief would leave the parties to their remedies at law.

Of the jurisdiction of equity to grant the remedy of cancellation or rescission of contracts, this is said, in 4 Pomeroy's Eq. Jur. (3rd ed.), sec. 1377: " * * * its

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exercise depends upon the adequacy of the legal remedies, —a party being left to his affirmative *or defensive remedy* at law, where full and complete justice can thereby be done." (Italics supplied.)

There is absolutely no proof in the case of the existence of any of the primary grounds on which equity will cancel or rescind a contract, such as fraud, accident, or mistake in the procurement of the contract. Nor is there any evidence whatever of any default on the part of the appellant, Bruce Stark, in the performance of the contract. Under such circumstances a contract should not be cancelled or rescinded.

It is true that, in the instant case, the decree which is affirmed by the majority opinion, does not rescind the whole contract, but nearly so. It leaves in force the provision of the contract touching the improvements made by Bruce Stark. This operates to allow the latter damages to that extent because of the rescission of the contract. It is not perceived why he is not equably entitled to any damages he may have sustained because of such rescission by reason of other outlay, in performance of the contract, of labor or money, for which he has not been fully compensated as provided for in the contract.

Aside from the question as to what the precise terms of the contract were, the whole case as made by the evidence, even from the standpoint of the plaintiffs in the court below, the appellees here, is that it would be a hardship upon them, and therefore inequitable, to enforce the specific performance of the contract. This being so, all of the parties, should, as I think, be left to their remedies at law; since those remedies are adequate and complete, and, indeed, much more complete than in equity, under the circumstances of this case. At law the appellees can refuse to further perform the contract on their part and proceed to deal with the property involved, real and personal, which is already in their possession, as they may choose, leaving the appel-

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lants to their remedy by action for damages for breach of the contract. In such an action the terms of the contract ject, and whatever damages the appellants may have sus- can be ascertained by a jury from the evidence on the sub- tained, if any, (and the same is true of the appellees), can be assessed by a jury, (the preferable method of ascertain- ing all damages), and recovered. That course will more adequately satisfy justice and be less likely to do injustice to any of the parties, than to arbitrarily cancel the contract.

As said in *Wright* v. *Pucket*, 22 Gratt. (63 Va.) 370: "Whenever damages will answer the purposes of indemnity, this alternative will be preferred * * *."

The ends of justice would be best attained, as I think, if the suit were dismissed, without prejudice to the rights of any of the parties at law.

TERRY *v.* BISHOP-FRY CO., ET AL.

(*Wytheville, June 15, 1922.*)

1. REAL ESTATE AGENTS.—Commissions—Contracts—Procurement of Purchaser Able and Willing to Complete Contract of Sale—Evidence—Pleading and Practice—Motion to Set Aside Verdict.

Error to Circuit Court of Halifax county.

Reversed.

B. W. Leigh and *Jas. H. Guthrie*, for the plaintiff in error.

John Martin, for the defendants in error.

This is an action of trespass on the case in assumpsit brought by the defendant in error, (who will be hereinafter referred to as plaintiffs, or by their individual names), real estate agents, against the plaintiff in error, (who will be hereinafter referred to as defendant, or by his individual

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name), to recover certain commissions claimed by the plaintiffs as owing to them by the defendant on a perfected sale of real estate in accordance with the agreement between the parties.

There was a verdict for the defendant, Terry, which the court below set aside. Thereupon the court entered judgment for the plaintiffs, and the defendant brings error.

The declaration contains the common counts in assumpsit and also three special counts declaring upon the alleged special contract in writing relied on by the plaintiffs.

The special contract in writing is as follows:

"South Boston, Va., Oct. 18, 1919.

"Bishop-Fry Co., Real Estate Agents,
"South Boston, Va.

"I hereby place my property containing about 1800 acres, more or less, situated and described as follows: In Lunenburg county, Va., between Victoria and Kenbridge, and known as Beach Forest tract, and a part of the Guy Tuggle and Davis tracts, in your hands for sale, and I hereby authorize and empower you to sell upon the terms hereinafter set out, and to enter into and execute all necessary contracts with the purchaser, to carry out the sale. I agree to accept for the said property the sum of Fifteen Dollars ($15) per acre, terms not to be not less than one-fourth cash, the balance in three equal installments, payable on or before one, two and three years, from the date of sale. Deferred payments bearing 6% interest, and secured by deed of trust on the entire proprety, or at such smaller price as may be acceptable to me, and in consideration of the services to be performed by the said Bishop-Fry Company in effecting a sale of this property, I agree if the said property is sold by them, within 15 days, to pay them 10% of the selling price as their commission, or compensation for such services; said commission to be paid from the first payment of the purchaser.

"This agreement is in force and binding on me 15 days.

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Should I sell the land to any one whose attention as a purchaser has been called to the said property during the 15 days, this agreement will be in force and binding on me.

"E. M. Terry (Seal)."

"The life of this contract is fifteen days only, after which time it will become cancel."

The plaintiffs succeeded in making an executory contract of sale of the land to one S. W. Minor within the 15 days specified in the said special contract, which was evidenced by the following writing:

"Received of S. W. Minor One Hundred Dollars ($100.00) in part payment of a certain tract of land, situated in Lunenburg county, Virginia, on the south side of the Victoria-Kenbridge road, containing about 1,700 acres, more or less, it being the unsold portion of that tract of land, or tracts of land, known as the 'Beach Forest & Guy Tuggle & Davis Tact.' The purchase price of the aforesaid land is fifteen dollars ($15.00) per acre, payable one-fourth cash and the balance in equal installments on or before one, two and three years after date.

"It is understood and agreed that the one-fourth cash payment is due and payable upon the tender of a good and sufficient deed for said property with full convenants of warranty, free and clear of all encumbrances, the taxes on said lands for 1919 to be paid by the present owner of the land, E. M. Terry of South Boston, Virginia.

"This contract and agreement and sale made through Bishop-Fry Company, Real Estate Agents of South Boston, Virginia, under assigned option held by them.

"Witness our hands and seals in duplicate this 21st day of October, 1919.

"E. M. Terry (Seal)
By Bishop-Fry Co.
By F. W. Bishop
S. W. Minor (Seal)."

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It will be observed that this writing contains no provision fixing the day for completing the contract of sale.

Minor testified before the jury, to the effect, that when he signed the writing just mentioned he had an understanding with and expected the Atlantic Coast Realty Company to finance the transaction, and that he was to have a third and that Company two-thirds of any profits. That he turned the matter over to that company as soon as said writing was executed and the company had the title examined and found certain clouds upon it which the plaintiffs, the real estate agents, however, claimed constituted no real defect in the title. But that the realty company declined to put up any purchase money until the clouds were removed; and that, by mutual consent of the real estate agents, Minor and the realty company, the time for the completion of the contract of sale was postponed pending the ascertainment of what could or would be done about removing the clouds from the title, no definite time for the completion being named. There was other testimony to the same effect. The testimony for the defendant, Terry, was to the effect, however, that he had no communication with Minor or with the realty company direct, but solely through the plaintiff, Bishop. And Terry testified that the writing signed by Minor and the plaintiff real estate agents was never delivered to him, nor any copy of it, and that he at no time accepted that contract of sale as the performance on the part of the plaintiffs of the special contract with him aforesaid.

On the contrary the testimony of the defendant, Terry, before the jury was express that the plaintiff, Bishop, reported the matter to Terry, after the objections to the title aforesaid were made, Minor added to the written contract of sale to him the verbal agreement that, if Terry would institute a suit to remove the cloud from the title, Minor "was ready to take it" (the real estate) "at any time" that the title was cleared.

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The testimony of and for the defendant, Terry, is to the effect that he accordingly instituted a suit to remove the aforesaid clouds from the title; that he took that course, rather than bring a suit against Minor for specific performance of the contract between him and the plaintiff real estate agents aforesaid, at the special instance and request of the plaintiff, Bishop, who was acting for the other plaintiffs in the matter, because, as Bishop reported to Terry, and as Minor admitted in his testimony was true, Minor, being a president of a bank, was very adverse to the rights of the plaintiffs to recover commissions of the defendant, Terry, being tested by means of a suit against Minor for specific performance of his contract; that Minor did not want to be sued, because it might affect his credit and that of his bank; and that in the suit which Terry brought he obtained a decree removing the clouds from the title to the satisfaction of Minor so far as the decree of the lower court was concerned; but that Minor then refused to complete and repudiated the contract he had signed as further binding upon him, on the ground that he had never agreed to take the property "at any time," as Bishop had reported his agreement as aforesaid, taking the position that he was unwilling to wait for an appeal to the Supreme Court to be refused, or, if granted, to be decided, in order to ascertain whether the clouds aforesaid had been in truth removed. The reasons for this action on Minor's part are testified to by him, but as they are immaterial, they need not be stated here.

No purchase money was ever paid to Terry, nor any obligations, or deed of trust, given him, such as provided for in the special contract aforesaid between him and the plaintiffs.

The appeal referred to was in fact allowed by the appellate court, and the decree appealed from was affirmed.

The jury were correctly instructed to the effect that if they believed that the completion of the contract of sale was prevented solely by the inability of the defendant,

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Terry, to make a clear record title to the land, they should find for the plaintiffs.

Other pertinent matters are referred to in the option.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court.

In the view we take of the case, we need pass upon only one of the questions raised by the assignments of error, and that is this:

1. Did the court err in setting aside the verdict of the jury in favor of the defendant?

The question must be answered in the affirmative.

The rule upon this subject is, of course, well understood. If there was evidence before the jury, of a character not physically impossible or inherently incredible, which, if credited by the jury, was sufficient to sustain the verdict, it was reversible error in the trial court to set it aside.

In accordance with the evidence for the defendant, the contract, on which the action of the plaintiffs was based, did not obligate the defendant to pay the real estate agents' commissions for obtaining for the land owner an executory contract of sale, but only for the obtaining of a completed or perfected contract of sale, *i. e.*, a contract closed by becoming embodied in the contemplated deed and deed of trust and other papers expected to be executed at the time fixed for the completion of the executory contract. There was some conflict between the testimony for the respective parties on this subject, but there was ample testimony, of a character which the jury were free to believe, which, if believed by them, was sufficient to sustain the verdict on this point. As the jury, therefore, may have so found this fact, the court below could not have properly reached a conclusion of fact to the contrary, nor can this court. And the case turns upon this fact.

Where such is the contract between the land owner and the real estate agent, the liability of the land owner to the

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agent for commissions depends upon the question whether the agent, at the time fixed for the completion of a contract of sale which the agent relies on as entitling him to commissions, has produced a purchaser ready, willing and able to comply with the land owner's terms of sale as stipulated in the land owner's contract, or as varied by mutual consent. *Crockett* v. *Grayson*, 98 Va. 354, 36 S. E. 477; *Murray* v. *Richard*, 103 Va. 132, 48 S. E. 871. The case of *Bankers Loan Co.* v. *Spindle*, 108 Va. 426, relied on for the plaintiffs, is not at all in conflict with this holding, but expressly recognizes the correctness of the doctrine just stated.

It is very true that, as argued for plaintiffs, the actual completion of the contract of sale is not a condition precedent to the right of the agent to commissions. This is true where the contract between the owner and the agent provides for a completed contract of sale, equally as where an executory contract of sale merely is provided for. But, in both cases alike, the agent must produce, at the time fixed in the contract of sale for its completion, a purchaser ready, willing and able to comply with the owner's terms of sale aforesaid.

The evidence for the defendant, Terry, is to the effect that the contract of sale reported to the defendant and relied on by the plaintiffs as in performance on their part of their contract with the defendant, was the agreement of Minor to complete the executory contract of sale to him "at any time" the defendant might succeed in removing the clouds from the title by suit for that purpose. That was the contract of sale which the plaintiffs represented that they had obtained and on which representation the defendant relied and acted to his detriment in going to the expense of bringing the suit which he instituted, instead of a suit against Minor for specific performance of Minor's written agreement with the real estate agents. There is conflict in the evidence regarding these matters, but the verdict settled this conflict and concluded the fact that

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this modified contract with Minor was the contract of sale on which the plaintiffs had to rely in this action. That contract, in effect, postponed the time for the completion of it until such time in the future as might be required, in the exercise of due diligence, to complete the litigation necessary to perfect the title of record. The uncontroverted evidence shows that before the expiration of that time, (i. e., before the time fixed, as aforesaid, for the completion of the contract of sale), the purchaser announced his unwillingness to comply with any terms of purchase and repudiated the contract of sale *in toto*. Subsequently, the defendant succeeded, in the suit instituted by him, at and in accordance with the request of plaintiffs themselves, for the purpose of removing the clouds from the title to which there had been objection, in obtaining a decree of the circuit court, and subsequently a decree of the Supreme Court of Appeals, affirming the decree of the lower court, which removed the alleged clouds upon the title. Then arrived the time fixed as aforesaid, for the completion of the aforesaid contract of sale, and no purchaser was then produced or could be produced by the plaintiffs. Such being the case, it is obvious that the plaintiffs did not produce a purchaser ready and willing to comply with the terms of sale at the requisite time to entitle them to recover anything under their contract with the defendant.

There was testimony before the jury tending to show that the purchaser, Minor, was not financially *able* to complete the contract of sale even at the time he repudiated it, and that he repudiated it for that reason, and not because of any alleged cloud upon the title; but it is unnecessary to consider those questions, as it is clear that however *able*, he was not *willing* to complete the contract of sale when the time arrived therefor.

The judgment under review will, therefore, be reversed, and final judgment will be entered for the defendant, with costs.

Reversed and final judgment.

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THRIFT *v.* COMMONWEALTH.

(*Wytheville, June 15, 1922.*)

1. APPEAL AND ERROR.—Bill of Exception—Time of Signing—Code, sec. 6252.

Error to Circuit Court of Arlington county.

Dismissed.

T. Morris Wampler, for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

BURKS, J.:

Only one error is assigned in the petition for the writ of error, and that is dependent upon the exception taken at the trial. Under date of October 31, 1921, the record shows a verdict and judgment against the plaintiff in error, a motion to set aside the verdict, and that the motion was overruled, and that to this action of the court the prisoner by counsel "excepted and tendered his bill of exceptions which was signed, sealed and enrolled and made a part of the record in this case." But no such bill of exception appears in the record. Only one bill of exception appears in the record, and that is one hereinafter referred to, dated December 30, 1921, and contains all the evidence in the case, and the following exception to evidence: "At the conclusion of the evidence of A. C. Clements, the Commonwealth offered in evidence several of the containers, crates and cartons, together with their contents, to the introduction of which counsel for defendant objected, which objection of the defendant the court overruled, to which ruling of the court the prisoner excepted."

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Final judgment was pronounced in the cause on October 31, 1921, and the bill of exception was not signed and made a part of the record till December 30. This was not within 60 days of the final judgment, as prescribed by section 6252 of the Code. The date on which the final judgment was rendered is to be counted as one of the sixty days. *Kelly* v. *Trehy*, decided at this term, and cases cited. Thus counting, there was one day in October, thirty in November and twenty-nine in December. The sixty days expired on the last mentioned date. December 30, when the bill was signed, was the sixty-first day. The trial judge was without jurisdiction to sign the bill of exception on December 30. *Bragg* v. *Justis*, 129 Va. 354, 22 Va. App. 294; *Exporters* v. *Butterworth*, 42 Sup. Ct. 331. But even if we could look to the bill of exception, the record does not disclose error to the prejudice of the accused. The claim that evidence was used against the accused which was obtained by an illegal search is not sustained by the record. In the bill of exception which was taken, no objection was made on account of an illegal search. The search warrant was "produced and filed in the case" without objection or exception of any kind. There is no evidence of its illegality or informality, and we will not presume it sixty days after final judgment; and the evidence sufficiently discloses that what was found and offered in evidence was corn whiskey.

The writ of error will be dismissed as improvidently awarded.

Dismissed.

VIRGINIA RAILWAY & POWER CO. v. WELLONS.

(*Wytheville, June 15, 1922.*)

1. STREET RAILWAYS.—Collision—Automobiles—Negligence—Contributory Negligence—Evidence—Last Clear Chance—Instructions—Ordinary Care—Vehicle Crossing Street—Warning of Approach of Car—Violation of Ordinance.
2. APPEAL AND ERROR.—Rule of Decision—Consideration of Evidence—Code, sec. 6331.

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Error to Hustings Court, Part Two, of city of Richmond.

Affirmed.

M. M. McGuire and *Justin Moore,* for the plaintiff in error.

David A. Harrison, Byrd & Gwathmey and *Fulton & Wicker,* for the defendant in error.

KELLY, P.:

This action arises out of a collision between an automobile owned and operated by the plaintiff, J. D. Wellons, and a street car owned and operated by the defendant, the Virginia Railway and Power Company. Wellons was slightly injured and his automobile was wrecked. The jury returned a verdict in his favor for $1,250, upon which the trial court entered the judgment under review.

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The accident occurred on Broad street in the city of Richmond, in the block between Belvidere on the west and Henry street on the east. Broad street, on which the defendant maintains and operates a double track street car line, runs east and west. Belvidere and Henry streets run north and south. The street car was going west, and the automobile, which had been headed east on the south side of Broad street, was crossing the tracks within the block for the purpose of making a complete turn. The westbound track, on which the collision occurred, is slightly north of the middle of the street.

Just prior to the accident, the plaintiff came north on Belvidere street to Broad, and then east on the south side of Broad to a tank about the middle of the block, where he stopped and filled the radiator of his motor. He then started east again, intending directly to make the turn by crossing the tracks to the north. When he had proceeded east about 15 feet from the water tank, he stopped to allow an eastbound street car and an eastbound automobile to

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pass him. We quote from his testimony at this point as follows:

"Then I started up my car and turned off, and I looked over in the middle of the next block across Henry street and saw a car coming west. I pulled up to the car track and thought I had plenty of time to give me the signal to turn into the car track. About the time I got to the car track, near it, or somewhere about the car track, I looked as I usually do and I saw this car coming west. It was then across Henry street, about 175 feet from me, I should judge, something like that. I pulled right on across, thinking I had plenty of time, and the time I got on the track good, got about a little over the track, it hit me. * * * It hit kind of behind the seat, in the door and behind the seat of the car. It was a little over half way of the rear of the car. I was just turning across the street going west. I didn't have the engine turned all the way west but had my wheels turned."

He testified further that at the moment of the collision the front wheels of his machine were entirely across the west-bound track; that he was running in low gear about four miles an hour; that the street car must have been running about thirty miles an hour because otherwise it would not have struck him; and that after the collision the street car ran about 210 feet before it stopped—more than twice the distance requisite for a quick stop at a lawful rate of speed.

The plaintiff's witness, Stennette, who was riding with him, testified that he first saw the street car as the automobile was "right on" the first or southern track; that the street car was then about 30 or 35 feet east of Henry street, and about 170 or 175 feet east of the point of collision; that at that time he "did not realize any danger;" that he did not notice the street car again until it was within 30 or 35 feet of them; and that he thinks the car, basing his

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estimate "on driving and the speed it was coming and the way it knocked us," was about 30 or 35 miles an hour.

The street car, under the terms of a city ordinance in evidence, had the right of way, and it would have been the duty of the plaintiff to yield if, when started across the tracks, the relative position of the two vehicles was such as that a reasonably prudent man would have foreseen that a collission was likely to occur unless one or the other stopped. *Va. Ry. & P. Co.* v. *Hill* 120 Va. 397, 405, 13 Va. App. 238. By another city ordinance the street car was prohibited from running at a speed of more than twelve miles an hour.

There were a number of eyewitnesses to the accident, and there is considerable conflict in the testimony as to the speed of the car and the relative positions of the two vehicles when the plaintiff was approaching the track on which the accident occurred. It is not necessary at this point to say more wth reference to the evidence than that the jury as the triers of the facts were well warranted in finding them as testified to by the plaintiff and his companion. Taking these facts as true, and of course they must be so taken in this court, it is plain that the assignment of error based on the contention that the verdict should have been set aside because the plaintiff was guilty of contibutory negligence must be overruled. Contributory negligence in cases of this kind is usually, though not always, a matter to be passed on and determined by a jury. *Va. Ry. & P. Co.* v. *Oliver*, decided to-day.

In the instant case the plaintiff and his companion, just as they were about to enter the first or southern track, saw the car 175 feet away with the Henry street crossing intervening. They then had, even at the perhaps too liberal estimate contended for by the defendant, not over 35 feet to go before the rear end of the automobile would be entirely clear af the second or west-bound track. The plaintiff testified that he thought he had plenty of time to cross, and Stennett says he realized no danger at that time. It seems

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to us that an ordinarily prudent driver might well have taken the same view of the situation; and at any rate we cannot say that the jury was bound under the evidence to find the plaintiff guilty of contributory negligence.

It is insisted in the brief for the defendant that the plaintiff and his companion observed the excessive speed of the car, 30 or 35 miles an hour, when they first saw it beyond the Henry street crossing, and a mathematical calculation, based upon the relative speed of the vehicles and the distance to be traversed by each, is offered to show that a collision was inevitable if the car was running as fast as they say it was. But the plaintiff could hardly have been expected to make such a calculation at the moment, or to gauge his movements with mathematical accuracy; and, apart from these considerations, a conclusive answer to the defendant's contention in this connection is that neither the plaintiff nor his companion said anything which fairly indicates that they based their estimate of the speed of the car upon its appearance when they first observed it 175 feet away, and 30 to 50 feet east of Henry street. It is true that they say they did not observe any reduction in the speed of the car before the collision occurred, but their estimates as to the rate of speed at which it was running are clearly shown in their testimony to have been deduced subsequently, from the fact that the car would not have caught them at all, and would not have run so far beyond the point of collision before stopping, if it had not been running at about the rate fixed in their estimate. This conclusion on their part as to the speed of the car is supported by the mathematical calculation above referred to, and it is in the retrosect rather than in advance of the accident, that there is time and opportunity to make and apply such calculations.

We have dealt somewhat fully with the question of contributory negligence because considerable stress was laid upon it in the briefs; but as we understand counsel for the

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defendant, the position upon which they chiefly rely is that the court erred in allowing the jury to consider the doctrine of last clear chance, and also in the manner in which that doctrine was set forth in the instructions. If they are right in this position, the error is material, for the case was undoubtedly tried in part upon the theory that even if the plaintiff was guilty of contributory negligence, he ought still to recover because the defendant had a last clear chance to avoid the accident. In other words, the jury had before it two theories upon either of which it might have found for the plaintiff, and since we cannot say which one was adopted by them an error with respect to either would have to be regarded as prejudicial. The evidence, as already stated, was in conflict, and if the jury had believed only the witnesses for the defendant, they might well have concluded that the plaintiff was guilty of contributory negligence, and in that event could only have found for the plaintiff on the last clear chance theory. We must, therefore, seriously consider this branch of the case.

In this connection the defendant's first contention is that the last clear chance doctrine could not, in any view of the evidence, apply to the case. This position is not tenable. We must now keep in mind that the jury may have believed the defendant's evidence to such an extent as to have established the contributory negligence of the plaintiff—otherwise, of course, the last clear chance theory and any error affecting it is immaterial. The motorman's testimony is unsatisfactory and contradictory within itself to some extent, but one very reasonable interpretation of it is that he saw the automobile moving at four to six miles an hour and in the act of entering the west-bound track about forty feet ahead of him. If this was true, and especially if, as the jury in all probability believed, he was exceeding the speed limit, he must have known that the automobile could not clear the track unless he checked his own speed, and yet he said at least twice in his testimony—the last time em-

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phatically—that he did not reverse the car (the only thing he claims to have done for the purpose of slowing down or coming to a stop) until he was within ten feet of the plaintiff. If this was, as it might fairly have been, the view adopted by the jury, then the motorman saw the plaintiff in a position of danger from which it was perfectly apparent that he would not and could not exticate himself unless the speed of the car was arrested. And if the jury believed, as it might have done under the evidence, that after this situation arose the motorman, in the exercise of ordinary care, could have avoided the accident by some pompt action on his part, the theory of the last clear chance was applicable. *Gunter* v. *Southern Ry. Co.*, 126 Va. 565, 585. The motorman could not have stopped the car in 40 feet, but he could have perhaps materially reduced the speed, and thus allowed the automobile to clear the crossing. Both front wheels were already across when the collision occurred.

The next position taken by the defendant is that even if the doctrine of the last clear chance can be properly applied to the evidence, the court improperly instructed the jury on the subject.

Instruction No. 4, given at the instance of the plaintiff, over the defendant's objection, was as follows:

"The jury are instructed that although they may believe from the evidence that the plaintiff was guilty of contributory negligence in driving his car in front of and in dangerous proximity to the defendant's street car, yet if they further believe from the evidence that after the defendant's motorman in the exercise of ordinary care, saw or ought to have seen the plaintiff's danger in time to have avoided the accident and injury to him, and failed to do so, and by reason of such failure the plaintiff and his automobile received the injury complained of, they should find for the plaintiff."

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The first criticism urged against this instruction is that it failed to tell the jury that the plaintiff must have appeared to the motorman to be unconscious of his danger. It is readily manifest that this criticism is not well founded. Unconsciousness of the danger by a plaintiff may be the test in some cases, but it is not the sole test of the right to invoke the rule of the last clear chance. For example, a man negligently crossing a long railroad bridge or trestle may, before he gets across, see a train coming and be painfully conscious of his danger; and yet he will in such a case be entitled to recover if the engineer, by the exercise of ordinary care, could have seen his peril and avoided injuring him, and failed to do so. In the instant case, if the situation was such as that the motorman was obliged to know that a collision was inevitable unless he checked his own speed, then the question of the plaintiff's consciousness of his danger is immaterial. His realization of the danger would not have helped his situation after his car was on the track.

The second objection to the instruction under consideration is that it failed to tell the jury that there must have been "some superadded fact or circumstance brought home to the knowledge of the defendant's agent and sufficient to put a reasonable man on his guard that the plaintiff paid no attention to his danger and would take no steps to insure his safety."

This is much the same as the objection last above discussed and is answered by what has already been said. The essential "superadded fact or circumstance" was that the plaintiff was undoubtedly entering the track and would not get across if the motorman maintained his speed.

In *Virginia Ry. & Power Co.* v. *Smith and Hicks*, 129 Va. 269, 274, we said: "Counsel for the respective parties are not agreed as to whether the instruction was in fact intended to present the theory of the last clear chance. Assuming that it was, however, and assuming further that

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the plaintiff's employee negligently stopped the truck on the track, there was abundant evidence from the plaintiff's standpoint, if credited by the jury, to show that after the motorman saw, or ought to have seen, that the truck was in, or about to get in, a position where a collision was inevitable unless the street car was checked or stopped, he could have avoided the collision by the exercise of ordinary care on his part. The instruction might have been more accurately worded if intended to present the last clear chance theory, but it is substantially the one which, under somewhat kindred facts, was held in *Va. Ry. & P. Co.* v. *Meyer,* 117 Va. 400, 84 S. E. 742, not to incorrectly state the doctrine. The sufficiency and correctness of an instruction depend largely upon the facts and nature of the case in which it is given. It is quite conceivable that a motorman might have the right of way (as did this motorman), and yet see, or be in a position to see, that unless he slackened his speed or stopped his car, a collision with a vehicle about to cross ahead of him would be inevitable. In such a case, if the discovery of the inevitable was made, or ought to have been made, before it was too late for him to slow down or stop, he would have the last clear chance to avoid the injury, and the street car owner would be liable, regardless of the fact that the negligent conduct of the driver of the vehicle precipitated the situation, and continued up to the moment of impact. This was the essential, though not actually expressed, holding in the *Meyer Case,* and is here one of the views which the jury might have taken of the evidence."

The third objection to the instruction is that it imposes upon the defendant the absolute duty to avoid the accident, whereas its duty was only to *exercise ordinary care* to prevent the collision. The instruction can hardly be so interpreted. It tells the jury that "if they shall further believe from the evidence that after the defendant's motorman in the exercise of ordinary care saw, or ought to have seen,

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the plaintiff's danger in time to have avoided the accident and injury to him and failed to do so," and from this language the words "ordinary care" would naturally be understood as referring not only to seeing the danger but also to avoiding the accident.

The instructions as a whole were quite favorable to the defendant, and at least two of them practically ignored any question of the last clear chance by telling the jury unqualifiedly that if the plaintiff was guilty of contributory negligence he could not recover. Defendant's instruction No. 4 is not a model, but as applied to the facts in this case it was a reasonably fair statement of the doctrine of the last clear chance. *Va. Ry. & P. Co.* v. *Smith and Hicks, supra.*

It is insisted that the court erred in refusing to give instruction "B," offered by the defendant, as follows:

"The court instructs the jury that in order for the motorman of the street car to have had the last clear chance to avoid the accident, as mentioned in another instruction given by the court, the jury must believe from the evidence that the plaintiff negligently placed himself in a position of peril on the defendant's track, at a time and under such circumstances that he could not have extricated himself in time to avoid the accident, and that at that time, the motorman, in the exercise of ordinary care, saw or should have seen the plaintiff's peril in time to avoid the accident, and should have realized that the plaintiff could not avoid the accident, but that thereafter there elapsed an appreciable interval of time during which he could have avoided the accident and the plaintiff could not, and that the motorman negligently failed so to do."

This instruction seems to be free from serious objection and might very appropriately have been given, but we are of opinion that every defense which could have been made against a recovery upon the doctrine of the last clear chance under this instruction could equally as well have been made

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under instruction No. 4, to which it refers. In this view, it was not error to refuse instruction "B". *DuPont* v. *Snead*, 124 Va. 177, 187, 17 Va. App. 161.

The plaintiff was allowed, over the defendant's objection, to introduce in evidence the following ordinance of the city of Richmond:

"Each motorman of a street railway car shall keep a vigilant watch for all teams, carriages or persons, especially children, and shall strike a bell or gong several times in quick succession on approaching within 100 feet of such team, carriage or person. After the striking of such bell or gong any person in charge or control of such team or carriage, moving or being driven upon the tracks used by said car shall immediately take proper steps, either by lawful increase of speed or by turning off of said tracks to prevent obstructing or impeding the running of such car."

The objection to this ordinance in evidence is that it had no application to a vehicle crossing the street, but referred to vehicles on the tracks ahead of an approaching street car. We are unable to accept this construction of the ordinance. It obviously refers not only to vehicles which may be moving along the track ahead of street cars, but to all "teams, carriages, persons and children," certainly where they are, as this automobile was, on the track at a place other than a regular street crossing. There was evidence tending to show that the ordinance was violated, and this being true the alleged error with respect to instruction No. 2 must be disregarded. That instruction merely told the jury that if the ordinance was violated, such violation constituted negligence on the part of the defendant.

2

In *Virginia Ry. & Power Co.* v. *Smith and Hicks, supra,* we said: "The revisors, in section 6331 of the Code of 1919, in keeping with the modern trend of legislative and judicial policy, added a new clause to the old section (Code

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1887, section 3449); and the statute now provides that 'no judgment or decree shall be reversed * * * for any error committed on the trial where it plainly appears from the evidence given at the trial that the parties have had a fair trial on the merits, and substantial justice has been done.' It is our purpose to vitalize this provision in its application and administration. Of course, there will always be room for doubt as to whether the right result has been reached when the evidence has been in serious conflict; but in causes triable and tried by juries 'substantial justice' in a legal sense has been attained when litigants have had one fair trial on the merits; and although instruction No. 3 was open to the criticism which we have discussed, it could not have reasonably misled the jury, and we hold that the error does not warrant reversal."

In this case we are satisfied that the vital questions of fact were fairly submitted to the jury, that the parties had a fair trial upon the merits, and that, therefore, the law has done the best it can in attaining substantial justice with respect to the controversy.

The judgment is affirmed.

Affirmed.

VIRGINIA RAILWAY & POWER CO. *v.* OLIVER.

(*Wytheville, June 15, 1922.*)

1. STREET RAILWAYS.—Crossing—Collision—Personal Injury—Negligence—Excessive Rate of Speed—Failure to Give Warning of Approach of Car—Evidence.

Error to Hustings Court, Part Two, of city of Richmond.

Affirmed.

E. R. Williams and *T. Justin Moore*, for the plaintiff in error.

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L. O. Wendenburg and *T. Gray Haddon*, for the defendant in error.

WEST, J., absent.

KELLY, P.:

This action was brought by W. J. Oliver against the Virginia Railway and Power Company to recover damages for personal injuries sustained by him when a dairy wagon which he was driving was struck by one of the company's street cars at the intersection of Fourth and Main streets in the city of Richmond. The defendant demurred to the evidence, and this is a writ of error to the judgment of the trial court overruling the demurrer and awarding the plaintiff a recovery for the amount fixed by the jury in their conditional verdict.

The declaration charged the defendant with negligence in failing to keep a proper lookout for persons and vehicles at the crossing, in operating the car at an excessive and dangerous speed, and in failing to give notice of its approach as required by the city ordinance.

Fourth street runs north and south, and Main street runs east and west. The defendant operates a double track car line on Main street. The accident occurred on the westbound track, which is situated slightly north of the middle of the last named street.

Ordinances of the city, which were in evidence, provide that all vehicles and street cars going east or west shall have the right of way over all vehicles or street cars going north or south; and that street cars shall not run at a greater rate of speed than twelve miles an hour, and shall give ample notice of their approach to drivers of vehicles, and also "afford all reasonable opportunity for them, or either of them, to avoid collision or accident."

The plaintiff had come south on Fourth street, and was

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attempting to cross Main, when his wagon was struck by a west-bound street car, and he received the injuries for which this action was brought. He describes the character and extent of the precaution and lookout exercised by him as follows:

"As soon as I approached Main street, got as close as I thought to Main street as to stop in case a car or anything of that sort had been approaching anywhere in the way, I looked east across the corner of Fourth street by the corner of the house, which I could see clear about 90 feet back as well as I could estimate from the point I was at. * * * As near as I can get at it my horse was about 18 to 20 feet, something like that, from the track. Then, of course, the time I looked that way and looked west to see that everything was clear, my horse was going (in a slow or jog trot) at the same time, all that happened in about the time it took me to get on the track, when the crash came. * * * After I looked to the east and west I kept straight on. * * * When the crash came was my first knowledge of it (the car)."

Accurate and undisputed measurements appearing in the evidence show that when the horse was 18 or 20 feet from the rails, the plaintiff had an unobstructed view of the track to the east for the entire length of the block back to Fifth street. He could perhaps not have seen a car much further off in that direction than Fifth street because of the rather precipitous down grade on Main street to the east from the Fifth street crossing. After coming up the hill from the east to that crossing the tracks run slightly down grade to Fourth street.

The motorman gave no signal or warning of his approach, and in fact was not looking ahead and was paying no attention whatever to the crossing.

A witness named Callis, a railroad conductor of many years experience, who happened to be a passenger on the street car, testified that he had some knowledge of speed,

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that he would not like to estimate the speed of the car, but that it was behind time and "was running very fast," so fast as to make "trees and all dart by the windows." Another railroad conductor, also a passenger on the car, estimated the speed as being fifteen to eighteen miles an hour. The witness Callis further testified that for certainly as much as a minute, and probably longer, just prior to the accident, the motorman was looking back over his shoulder, and talking to the street car conductor, and that when the collision occurred the motorman "had his head turned in this way, telling the conductor something, looking over his shoulder, and they were talking and both laughed; they were both in a big laugh about something, and he was looking at the conductor at the time they hit."

The horse appears to have cleared both rails before the wagon was struck. He was thrown down by the force of the collision with the wagon, but fell on the south side of the track, and his only injury was a small abrasion on the opposite side from the car, caused perhaps by the fall. The wagon was torn loose from the horse, and was carried for a distance of nearly half of the next square before the car was stopped. The wagon was completely wrecked, and, when the car stopped, was on the north side hanging to the right hand fender. In explanation of this situation the plaintiff testified that "after the car had dragged it that way, it had slid around to the side."

With the exception of the city ordinance relating to the right of way, and certain measurements and physical conditions at and near the crossing, the defendant introduced no evidence. It is conceded by counsel for the defendant that the negligence alleged in the declaration must be regarded upon the demurrer as sufficiently established; but we have set out the evidence somewhat fully because we regard it quite material, not only as suporting the charge of defendant's primary negligence, but also as throwing

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light upon the question, whether the plaintiff was guilty of contributory negligence as a matter of law.

It is the theory of the defendant that the plaintiff, as shown by his own testimony and the physical conditions surrounding him, would have necessarily seen the car in time to avoid the collision if he had looked out for it as an ordinarily prudent man would have done. We are unable to take this view of the case, but are of opinion that the question was one upon which a jury might properly have found either for or against the plaintiff, and that a verdict either way would have been conclusive upon the court. This being true, the demurrer to the evidence was properly overruled.

It is doubtless true, as contended, that the plaintiff could have seen the car somewhere in the block when he says he locked to the east about 90 feet, for notwithstanding the high speed of the car, it had then probably topped the hill at Fifth street, but it must be remembered, first, that the plaintiff did not attempt to do more on his direct examination and declined to attempt more on cross-examination than to approximate the distance of the horse from the track or how far he looked to the east, and, second, that he was not required, in the exercise of ordinary care, to look the whole length of the block. His cross-examination tended to show that his horse was closer to the track than his first estimate of 18 or 20 feet, but was stlll in safe stopping distance when he looked east. However this may be, if he had looked even further east, and had actually seen the car at the far end of the block, he might reasonably have relied to some extent upon the assumption that it would observe the speed limit, and if it had done so he would have crossed in safety. Under such circumstances the right of way ordinance did not obligate him to stop and wait for the car to pass. *Va. Ry. & P. Co.* v. *Hill,* 120 Va. 397, 405, 13 Va. App. 238; *Va. Ry. & P. Co.* v. *Slack Grocery Co.,* 126 Va. 385, 393-4, 19 Va. App. 646.

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It seems to us that a very fair view of the plaintiff's evidence is this: At a short distance from the crossing, as he says, "as close as to stop in case a car was approaching," he looked east for a reasonable distance, then looked west, and seeing no car "kept straight on." This is what the ordinarily prudent driver does at a crossing. Of course, it is true that the car was quite near when he actually went on the track, but he could not look east and west and straight ahead all at the same time, and he had, as every driver at such a crossing has, three avenues to watch. The car undoubtedly caught him in a few seconds after he looked east, but street railway crossings in cities usually must be made in seconds, and if the car had been running at a lawful speed he would have crossed in safety. His horse was across, and in perhaps a second more the wagon would have cleared the track.

It seems at least highly probable that the excessive speed of the car was the proximate cause of the accident. The testimony of the witness, Callis, is clear and positive to the effect that the car was running very fast, that the motorman had been talking to the conductor and had his head turned toward the rear of the car for at least a minute and probably longer, and that they were "in a big laugh" when the wagon was struck. The fair inference is that the car, after coming up the hill to Fifth street under high power, was given no attention by the motorman, and traversed the distance down grade between Fifth and Fourth streets in fewer seconds than were required for the plaintiff to cross the tracks after making what an ordinarily prudent driver of a wagon would have regarded a safe lookout. This inference is strengthened by the fact that after striking the wagon and tearing it loose from the horse, the car dragged the wagon along, according to the testimony of Callis, nearly half the length of a city block before it stopped.

We are of opinion that this case is controlled by the principles announced in *Va. Ry. & P. Co.* v. *Slack Grocery Co.*,

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supra, and other similiar cases therein cited, and not by the decision in *Va. Ry. & P. Co.* v. *Boltz*, 122 Va. 549, 15 Va. App. 518, and others like it relied on by the defendant.

The judgment is affirmed.

Affirmed.

WARREN, ET ALS., *v.* GOODRICH STRIP & SCREEN CO.

(*Wytheville, June 15, 1922.*)

1. CONTRACTS.—Construction of Building—Plans and Specifications—Additions, Omissions and Alterations Directed by Owner—Abrogation of Contract—Instructions—Evidence.
2. IDEM.—Construction of Building—Amount of Recovery—Liability of Joint Owners Part of Whom Did Not Execute Contract—Principal and Agent—Tenants in Common—Authority of Co-Owner—Ratification—Acceptance.
3. EVIDENCE.—Collateral Issue.

Error to Corporation Court of city of Newport News.

Reversed.

Lett & Massie and *J. Winston Read*, for the plaintiffs in error.

Nelms, Colonna & McMurran and *Tazewell Taylor*, for the defendants in error.

This is an action by notice of motion instituted by the defendants in error, (who will be hereinafter referred to as the contractors), against the plaintiffs in error, Warren, Barnes, W. S. Greene and Minnie E. Greene, his wife, (who will be hereinafter referred to by their individual names or as owners), seeking to recover the sum of $16,619.-58, with interest, being the alleged balance due the contractors on an account attached to the notice of motion, which account contains the alleged cost, plus ten per cent, of the materials furnished and labor done by the contrac-

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tors for the said owners in the remodeling of a certain building known as the Gloucester Apartments, owned by and located on a certain lot belonging to the said owners.

The jury found a verdict for the contractors for the sum of $12,778.78, in accordance with which the judgment under review was entered and the owners bring error.

The assignments of error concern the action of the trial court in the admission of certain evidence, in the giving and refusing of certain instructions and in the refusal to set aside the verdict as contrary to the law and the evidence.

According to the evidence there was first a writing of date August 16, 1919, which consisted of a proposal and conditional acceptance, as follows:

"Newport News, Va., (Aug. 16th, 1919)

"Messrs. J. E. Warren and W. S. Green,
Newport News, Virginia.

"We hereby propose and agree to furnish all necessary material and labor for the remodeling of your building, 29th Street and West Avenue, subject to the following exceptions:

"Omit large front columns which are shown on plans.

"Omit first and second floor French doors, leaving the present windows.

"Use all old material that is good and balance to be removed by builders.

"Front and side porch to be red cement lined in squares so as to resemble tile.

"Balance of work to be completed according to plans at cost plus ten per centum (10%), finished cost, including our ten per centum, not to exceed Twenty-one Thousand ($21,000) dollars.

"Payments every thirty days according to progress of work.

"Final settlement upon completion.

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"REMARKS.

"The following items are included in this contract according to agreement.

"Brick and cement work.

"Lumber and mill work.

"Plumbing and heating.

"Lath and plaster (use all old laths where possible).

"Interior and exterior painting.

"Electric wiring (fixtures not included in this contract).

"Roofing and spouting.

"Screens and doors.

"Hardware (new hardware for all doors.)

"Labor.

"Fire escape.

"Work to be started in about ten days from date of acceptance, and completed in a through workmanlike manner.

Goodrich Strip & Screen Company,
"By E. M. Goodrich.

"Accepted:—Upon condition that E. F. Piland personally signs contract.

"J. E. Warren.

"Dated:—Aug. 16, 1919."

It will be noted that this writing, after providing for certain ommissions, stipulated as follows: "Balance of the work to be completed according to plans," etc., nothing being said about specifications.

The evidence shows that, before this writing became a contract by the signature of Piland, which was required by the conditional acceptance of the proposal signed by Warren, specifications were furnished the contractors by Warren, but the evidence is conflicting on the question of whether the specifications were at the time or thereafter mutually considered by Warren and the contractors as forming a part of the contract.

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The specifications contained, among other things, the following provision:

"The owner may, without invalidating the contract, make changes by alterating, adding to or deducting from the work * * *."

The specifications contained some other provisions with respect to material to be furnished and the work to be done in connection therewith, which the plans, from their very nature could not, and did not show, and which the proposal in writing aforesaid did not specify. These items, however, are not large in number or in amount as affecting the controversy between the parties.

Piland, on August 25, 1919, signed the provision which completed the written contract, which provision, appearing at the foot of the proposal and just below the signature of Warren, is as follows:

"Aug. 25, 1919. I agree with the above, it being understood owner furnishes rip-sawed flooring, and will personally sign contract.

"E. F. Piland."

None of the owners signed the contract except Warren, whose signature was given as appears above.

Meanwhile, between Aug. 16th and the 25th, some little work was done by Goodrich, one of the contractors, under the expectation that the proposal would be signed by his partner, Piland, so as to complete the contract, and after Piland did sign as aforesaid, the work under the contract proceeded.

The uncontroverted evidence, however, discloses that the owners, Barnes, W. S. Greene and Mrs. Greene, authorized Warren to obligate them to pay the contracters only the amount of $5,000.00 each, that is, one-fourth each of the total sum of $20,000.00, which it was understood between the owners was to be the limit of the outlay which Barnes, Greene and Mrs. Greene agreed to make for the remodeling of the building. It also appears from the evidence as an

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uncontroverted fact that, before the contractors did anything under the contract aforesaid, they were expressly informed that Barnes, W. S. and Mrs. Green had the agreement with Warren just mentioned and that the limit of the obligation of the three former parties to the contractors under the contract was $5,000.00 each. To this the contractors assented. It appears that while the contract imposed a limit of $21,000.00 on the contract price, the owners. other than Warren, supposed at the time that the limit mentioned in the contract was $20,000.00; and it does not appear from the evidence that Barnes or Mrs. Greene knew that the limit was $21,000.00, until after the work was completed, or that W. S. Greene knew of this, until some time after the contract was executed and the work had been partly done under it.

W. S. Greene's testimony on this subject, which is uncontradicted by any witness, was as follows:

"Before the work began witness had a conversation with Goodrich and emphasized the fact that every dollar he had was in that building, and cautioned him to do a good job and not to exceed the contract price, to which Goodrich replied that he understood that. Witness told Goodrich that he had an agreement with Warren, that the work would not exceed twenty thousand dollars. Goodrich stated that there would be no trouble about that at all, and it may cost a little less than that. Witness told Goodrich that he and his wife could not participate in an expenditure of more than $20,000.00."

* * * * * * * * * *

"All checks to the contractors were signed by Warren and countersigned by me. Every time a check was delivered witness called Goodrich's attention to the fact that his limit was $20,000.00, and told him not to exceed it. One day Goodrich called witness's attention to the fact that the contract price was $21,000.00, which was unknown to witness at the beginning of the work. Witness then saw Warren

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about the matter and found that this was a fact. When Warren made the last payment of $1,250.00 he made it from his personal fund."

Barnes' testimony on the same subject, which is likewise uncontroverted, is as follows:

"About the middle of August, 1919, witness met Goodrich at the baseball park, and he said 'Well, I got it.' Witness thought that Goodrich was interested only in putting screens in buildings, and inquired of him what he meant, to which Goodrich replied that he had gotten the contract to remodel the Gloucester apartments, for twenty thousand dollars. Witness then asked whether Goodrich had guessed at the amount, or did he know what amount the owners had appropriated for the work. Goodrich answered that was his price and his bid on the work. Witness told him that that was his limit, and not to exceed the contract price of $20,000. Witness did not know that the contract price was raised to $21,000.00."

* * * * * * * * * *

"As to the conversation with Mr. Piland, witness said that he saw Piland at the ball park one day, when the latter said to him, 'Mr. Barnes, that job is now completed and we would like to have our money.' Witness expressed surprise at this, and stated that the money to pay for the work had been provided for before the work had been begun. Witness stated that what he had in mind was the twenty thousand dollars. He then said he would see Mr. Warren about the matter, and did see him the next day and wanted to know why the contractors had not been paid for their work. Warren answered that he had paid them practically everything that was owing, but that the contractors had presented a large bill for extras, which he did not think a proper charge. This was the first time the witness knew that a bill for about thirty-seven thousand dollars had been presented. Witness afterwards saw Piland and communicated to him his conversation with Warren, and asked Piland why he

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did not follow the plans and specifications, to which Piland replied that the extras were for changes made in the work by Mr. Warren. Barnes told him that he knew nothing about any changes other than the front porch columns. Witness was astonished at the amount claimed, and expressed surprise to Piland that the bill was almost twice the contract price."

The conversation with Mr. Piland referred to in the quotation last made was a conversation relied on by the contractors to evidence the admission on the part of Barnes of his obligation to pay the whole of the claim of the contractors sued for. Piland's testimony as to this conversation is directly in conflict with the testimony of Barnes, above quoted, on the subject of this conversation, and was to the effect that, after the remodeling of the building was completed and the contractors had rendered their account for the amount subsequently sued for, (which was nearly $37,000.00 total, subject to $20,287.58 credits for payments made them), the following occurred:

"Mr. Barnes called me up over the telephone a few days afterwards, and made some remark, that I don't care to repeat, as to Mr. Warren, and said he thought it was a just account and he would see that I got every cent of my money.

"Q. Mr. Barnes said that?

"A. Yes.

"Q. To Mr. Barnes?

"A. Mr. Barnes called me, and asked me to meet him out at the ball park. I went out to the game that afternoon, and Mr. Barnes was busy when the game was over, and I could not see him; and he called me over the telephone after he got home, and after I had gotten home—probably six or seven o'clock—and we had a conversation with reference to the account.

"Q. My sole question was whether you mentioned the amount of your bill to Mr. Barnes?

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"A. Yes, I did. I looked up estimate and gave him the correct amount, and looked at the books and gave him the correct amount."

The work of remodeling the building, begun, as aforesaid, in August, 1919, under the written contract, was not completed until about April 1, 1920. When the work was completed the owners took possession of the building, W. S. Greene and wife going into and occupying certain apartments in it, and some, if not all, of the other rooms in the building were rented out by the owners to tenants.

The uncontroverted evidence is that beginning in October, 1919, the price for material and labor involved in the contract rose rapidly and had increased, before the work was completed, over 100 per cent over the prices prevailing when the cnotract was entered into. It appears that, with the exception of about $9,000.00 expended for labor and lumber, the contractors had the material and labor furnished by sub-contractors, who in most instances charged and were paid therefor on the basis of actual cost plus certain percentages, and the contractors added ten per cent of the totals to all of these bills as being a profit they were entitled to recover. Only in a few instances, of comparatively minor amounts, did the contractors protect themselves by making binding contracts with sub-contractors, and it seems that they did not protect themselves by purchasing any lumber or contracting for any labor, before the prices rose. In a number of instances, but not in all, they obtained estimates before entering into the contract with the owners from those who afterwards became sub-contractors, but the estimates were not binding on such sub-contractors. The result of this was that as the contractors proceeded with the work they were compelled to pay the actual market prices, which were continually increasing prices, for the material and labor needed, with the exception of the comparatively few instances in which they had binding contracts with their sub-contractors made before the contract with the owners

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was entered into. And, instead of furnishing all of the material and doing all of the work themselves, they in large part let the work to sub-contractors on a cost plus percentage basis, and, as aforesaid, added their claimed ten per cent profit to this cost. The evidence does not disclose whether it was within the mutual contemplation of the parties that this should be done. It seems, however, to have been a concessum in the trial of the case, and, indeed, appears from the testimony for the owners, that as of the times that the material and labor, not covered by the few and small binding contracts with the sub-contractors, were furnished, the prices which the contactors paid, of actual cost plus certain percentages, were as low as could then have been obtained and were, therefore, reasonable prices as of such times.

By mutual agreement the services of any architect in the supervision of the work, etc., were dispensed with and it was understood and agreed between Warren and the contractors that Warren was to act for the owners in the supervision of the work.

In the progress of the work a number of changes of construction were directed to be made by Warren, and a few by W. S. Greene, all of which were made by the contractors without any objection or express claim made at the time, that they were extras, or that the original contract was or would be abrogated by the changes or any of them, although in some instances of changes directed by Warren the evidence tends to show that Warren conceded at the time that they were extras, and some of them, such as removing shade trees, fences, old pavement, and certain additions to the building not covered by the plans, were conceded on the trial to be extras; but the owners claimed on the trial that there were certain omissions from the material and work required by the plans, mentioned in the contract, which, in the progress of the work, were omitted by the mutual consent of Warren and the contractors, in order to lessen the

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expense of the work, (about which consent no question was made on the trial by the contractors), which as claimed by the owners lessened the expense to the contractors to an amount in excess of the extras, so that the owners by reason thereof were entitled, as they claimed, in any aspect of the case, to a credit therefor on the $21,000.00 maximum contract price, which, together with the payments conceded by the contractors to have been made to them, left a balance owing the contractors of only $520.40 of the $21,000.00 maximum contract price.

It was also claimed by Greene and wife and Barnes that they in no aspect of the case, were liable beyond their one-fourth each of the maximum price of $20,000.00. Greene, in his testimony, claimed, in substance, that his directions of changes were made with that express understanding on the part of the contractors as well as of himself; that he ratified and approved of the other changes only upon that mutual understanding. There was no testimony in the case tending to show that Mrs. Greene acted upon any other basis than such a mutual understanding. And Barnes denied that he directed any changes or that his conduct was at any time inconsistent with his claim that he acted upon such mutual understanding.

On the other hand the contractors claimed on the trial that, while it was true that they started off with a written contract, under which they were to furnish the material and do the work, with a limitation upon the entire cost to the owners of $21,000.00, yet, from the very inception of the work and along during its progress, the owners, through the direction of Warren for the most part, and some through the direction of W. S. Greene and Barnes, made, with the assent of the contractors, such radical changes in the building that "only a very small part" of the original contract remained unaltered, so that, as claimed by them, the contractors had a right of action upon a parol contract for the whole work, on which, they were entitled to recover

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upon the basis of a *quantum meruit* for the value of the materials furnished and labor done for the owners.

There is some conflict in the evidence as to the number of the changes in the construction as actually made, as compared with the construction provided for in the written contract, but not much real conflict. There is no conflict in the evidence as to the character of these changes.

The contractors introduced no evidence to show that the building was so materially changed that it could not be reasonably recognized as the same building or work embraced in the written contract; that is to say they introduced no evidence to show that in the progress of the work the plans covered by the written contract were so entirely abandoned by the additions or omissions that it was impossible to trace the work provided for in the written contract and say to what part of the work the written contract applied and what part was extras and not covered by that contract; whereas the owners introduced express testimony to the effect that the building was not so changed. On the subject of the changes in the construction as provided for in the written contract the evidence for the contractors went no further than tending to show that the changes were very numerous and frequent and that it would have been extremely troublesome to have kept an account of the extra expense ossasioned by the changes. Indeed the testimony for the contractors shows affirmatively that much of the work was in accordance with the requirements of the written contact, and that it was known to the contractors at the time, when each of these changes were made and assented to by the contractors, what each and all of such changes were, and that the contractors could have kept their books so as to have shown what was the extra expense to them thereby occassioned; but that they did not, and made no attempt to do so. That they kept their books so as to show merely the actual expense to them of all of the material and work as the construction progressed, without making

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any distinction between what was in accordance with the written contract and what was occasioned by the changes, and that, speaking from the books as they were kept, it was impossible for them to say what was the extra expense occasioned by the changes. The contractors, however, filed in evidence a statement of the various changes of omissions from the additions to the work as required by the written contract, as claimed by them, which goes into great detail in its items, but no valuation is placed upon the different items. In the testimony for the contractors on the trial the extra expense to the contractors of some of these items are stated; but no attempt was made in the evidence for the contractors to show what was the extra expense to them of all the changes in additions, after giving credit for the benefit of the omission. They contended themselves with resting the case, upon this feature of it, upon the position that the changes were so numerous and frequent that they abrogated the written contract by mutual assent of the parties.

The court gave the following instructions, Nos. 1 and 2 for the contractors and A. B. C. and D. for the owners, the italicised portion of instruction C. being added by the court below over the objection of the owners:

"INSTRUCTIONS FOR PLAINTIFFS.

"1. The court instructs the jury that even though they may believe from the evidence that some of the defendants, being the owners of the apartment house in question, did not expressly authorize the plaintiffs to furnish the labor and materials and do the work in question, that still if they stood by in silence and saw the work done and materials furnished for work upon the premises in question belonging to them, and of which they have received the benefits and which they afterwards have accepted and enjoyed, that the law will imply a promise on the part of said defendants to pay the value of said work and materials, unless the jury

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believe from the evidence that the original written contract was not abrogated.

"2. The court instructs the jury that of they believe, from the evidence, that the contract between the plaintiffs and the defendants was so departed from, whether by additions, omissions or alterations, by the direction of the defendants or their duly authorized agent, so as to make it impossible to calculate the effect upon the contract price, whether by way of increasing that price or decreasing that price, then they shall find that the contract was abrogated. and that the defendants have accepted the building as remodeled by the plaintiffs, then the plaintiffs are entitled to recover against the defendants a sum the jury shall say represents a reasonable value of the work done and materials used by the plaintiffs in thus remodeling the said building, including a reasonable sum for profits, less any payments made by the defendants on account."

"INSTRUCTIONS FOR DEFENDANTS.

"A. The court instructs the jury that the mere fact that alterations and changes were made in the original plans for the building is not sufficient to show an abandonment or rescission of the original contract, unless the jury believe from the evidence that such original contract was changed in such material respect that the work done in and about the building could no longer be reasonably recognized as that originally contracted for.

"B. The court instructs the jury that when work is in progress on a building, pursuant to a contract in writing, and additions and alterations are made, the original contract, unless it be so throughly abandoned that it is impossible to trace it and to say to what part of the work it shall be applied, still exists and is binding on the parties as far as it can be followed.

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"And if the jury in this case believe that the original contract was not abandoned within the foregoing rules, then in arriving at their verdict, the jury should add to the sum of twenty-one thousand dollars ($21,000.00), the price of the rip-sawed flooring and the increased cost, if any, of the additions or alterations.

"Due allowance shall be made for any work or material omitted by agreement of the parties.

"C. The court instructs the jury that while a contract may be rescinded and terminated by mutual agreement of the parties, the evidence must be clear and satisfactory to show such agreement, *which evidence may be direct or implied from the acts of the parties.*

"D. The court instructs the jury that if they believe from the evidence that the contract of August 16, 1919, remained in full force and effect, then there can be no recovery for the reasonable value of the work and materials covered by the said contract of August 16, 1919, but the price stipulated in said contract is controling."

Other matters are referred to in the opinion of the court.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court.

So far as deemed necessary, the questions presented for our decision by the assignments of error will be disposed of in their order as stated below.

1 }

1. Did the court err in giving intruction No. 2, in that the standard it set up, by which the jury was to ascertain from the evidence whether the written contract was wholly abrogated, was erroneous in this, that the jury were thereby instructed that they should find that the contract was abrogated if they believed that the additions, omissions or alterations made by the direction of the owners, or their duly authorized agents, so departed from the contract as to make it impossible to calculate the effect upon the contract price?

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This question must be answered in the affirmative, for three reasons:

First:: Because there was no evidence whatever before the jury tending to show that the changes in question so departed from the contract as to make it impossible, if the facts had been shown in evidence, to calculate the effect upon the contract price. The very testimony for the contractors which was introduced on this subject showed that the contractors knew, at times the changes were directed, just what the changes from the plans covered by the contract were, in the utmost detail; that such plans were not wholly changed; and that, if the contractors had kept their books acordingly, there was no impossibility in their having had their books show precisely what expense to them, over and above the contract figures, if any, was occasioned by the changes. Indeed, the evidence for the contractors, consisting of the statement, filed by them in evidence, of all of the changes, both of additions and omissions from the contract plans, as claimed by them, and the testimony for them of the extra expense of some of these changes, demonstrates that there was no impossibility which prevented their introducing testimony before the jury showing the effect upon the contract price of such changes, notwithstanding the fact that their books had not been so kept as to show this. The record indicates that the contractors did not introduce such evidence to the extent of covering all the items in the statement filed by them as aforesaid, merely because they preferred to rely upon the position that the contract was wholly abrogated by the aforesaid changes.

Second: The standard in question, set up by the instruction, was erroneous, in that it was too vague and indefinite to serve as a proper guide to the jury upon the question in issue. The impossibility mentioned was not limited by the terms employed, and hence consisted of any impossibility whatsoever. Under such an instruction an impossibility on the part of the jury to calculate from the

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evidence before them the effect upon the contract price occasioned by the changes aforesaid, would have warranted them in finding the written contract abrogated. Such could not be the law, for it would offer a premium to a plaintiff in such situation to omit to prove his case.

Further: It is well settled what the correct standard is, in such case, by which to determine whether the special contract has been abrogated by subsequent changes, mutually agreed upon, in the construction of the building, differently from what was provided for in the contract, and that is this: To abrogate the contract the building must be so materially changed by such deviation from the contract that it cannot be reasonably recognized as the same building, or work, as that provided for in the original contract. That is to say, to abrogate the special contract, the plans covered by it must have been so entirely abandoned by the additions or omissions as to make it impossible to trace the work, provided for in the contract and to say to what part of the work the contract applied and to what part it did not. 6 R. C. L., sec. 298, p. 914; 9 C. J. 722; *Bozarth* v. *Dudley* (N. J.), 43 Am. Rep. 373.

As said in 6 R. C. L., sec. 298, p. 914: "When a building is in process of construction, and additions or alterations are made, the original contract, unless it be so entirely abandoned that it is impossible to trace it and say to what part of the work it shall be applied, is held still to exist, and to be binding on the parties so far as the work can be followed. The additions or alterations, if the expense of the work is thereby increased, may be the subject of a new contract, either express or implied, but they do not affect the original contract, which still remains in force."

As said in 9 C. J. 722: "Where * * * the original contract is deviated from in material respects, so that the work cannot reasonably be recognized as that originally contracted for, the original contract should be treated as abandoned."

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As said in *Bazarth* v. *Dudley, supra*: "Any contract may be abrogated or abandoned by the express agreement of the parties who made it. An abandonment may be implied also from the acts of the parties, as, for example, if upon the site upon which a building was to be erected under a written contract, the owner should direct the builder entirely variant in character, shape, material and style."

Instructions A. and B., given by the court, correctly stated the law on the subject of the abrogation of the original contract. Instruction No. 2, if intended to set up the same standard as instructions A. and B. by which the jury were to determine whether the contract was abrogated, was not properly phrased so to do; especially is this so when the instruction is read in the light of the only evidence introduced by the contractors on the subject of the "impossibility" mentioned therein; and being complete in itself, in that it directed a verdict, the defect was not cured by instructions A. and B.

Third: Instruction No. 2 was erroneous for the reason that there was no evidence to support it on the subject of the entire abrogation of the original contract, of the clear and convincing character which the law in such case requires.

Where the deviations from the original contract, which are relied on as having wholly abrogated the contract, are made by mutual consent, the law is that for the deviations to have that effect, the mutual intention that they shall have that effect, "must be apparent or clearly shown by implication." 30 Am. & Eng. Encyc. or Law, (2d ed.), p. 1211. That is to say, there must be clear, unequivocal and convincing evidence, direct or implied, of such intent, on the part of the owner, as well as of the contractor, before such effect ensues.

There is, in the case in judgment, an entire absence of any evidence tending to show that what the owners did, even Warren, whose conduct in directing changes was more

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extreme than that of any other owner, was not entirely consistent with the intention not to abrogate the original contract further than was occasioned by the changes which were made by the mutual consent of Warren and the contractors; and merely to ask for certain omissions, which would have the effect of reducing the total expense, and for certain additions, which would be extras, and have the effect of increasing the expense, the obligation being upon Warren of personally paying the contractors out of his own pocket whatever might be the excess, if any, of the total expense to the contractors over and above the price of $20,000.00, which was occasioned by such changes, after due credit was allowed for the omissions. That this is a correct view of the evidence becomes more apparent when it is considered that the uncontroverted evidence discloses that all of the omissions and additions aforesaid were assented to by the contractors, without the position being taken by them or either of them, at any time before the completion of the work, that the original contract would be entirely abrogated because of those changes. Indeed it appears from the statement of counsel for the contractors during the trial of the case, that not even upon the trial was the position taken by the contractors that the original contract had been entirely abrogated by the changes. The statement of counsel on the trial, referred to, is as follows:

"I want to say this, your Honor, in regard to our position in this matter: My friend is absolutely correct that we start off with a written contract. The terms of that contract are specific, namely, that we will do certain work for a certain agreed price, or, in other words, we will do that work at the actual" (something here omitted), "to the defendants, plus ten per cent., with the understanding that the entire cost to the defendants for that particular work shall not exceed $21,000. We have just started on the line of evidence, which I hope to develop later in the case, to the effect that when we started on that specific work, from its very

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inception, there were made changes in that contract, so that at the end, when the work is finally completed and accepted by these defendants is no more the contract *than a very, very small part of it*, by reason of the changes made, and that the written contract has been swallowed up on the parol contract growing out of these various changes that have been made during the prosecution of the work. We, therefore, find ourselves in the position that these things are so interwoven that you can't tell where the old contract starts and the new contract begins; and in a case of that kind the authorities are ample on the point that *you prove your contract as modified, and that is the contract in the case* * * *." (Italics supplied)

This statement, in its conclusion, is, in substance, a correct statement of the only contract of which there is any evidence in the record before us, namely, the original contract in writing as modified by the changes in construction made by mutual consent, as aforesaid. This being so; it is manifest that the instruction under consideration was misleading on the subject of the abrogation of the original contract; the result being to authorize the jury to find that the contract had been wholly abrogated, when there was no evidence before them on which such a finding could be properly based.

The quotations from the authorities and what we have said above, upon the subject under consideration, are applicable to cases in which the deviation from the original contract requirements are made by parol and by mutual consent of all the parties to such contract, so that that contract is not regarded as remaining open and unperformed. Deviations not mutually consented to, or made under special contract entered into, subsequently to the original special contract, involve other principles.

3. This being a case of mutual consent to changes in the original contract requirements, whether the specifications formed a part of the original contact in the case in

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judgment is not, as we think, a material question, as bear-upon the further question of whether such contract was abrogated.

As said in 6 R. C. L., section 298, pp. 914-5:

"It is true that a simple contract completely reduced to writing cannot be contradicted, changed or modified by parol evidence of what was said and done by the parties to it at the time it was made, because the parties agreed to put the contract into writing and to make the writing part and evidence thereof. The very purpose of the writing is to render the agreement more certain and to exclude parol evidence of it. Nevertheless, by the rules of the common law, it is competent for the parties to a simple contract in writing, before any breech of its provisions, either altogether to waive, dissolve, or abandon it, or add to, change, or modify it, or vary or qualify its terms, and thus make a new one. In such case the contract must be proved partly by the written and partly by the subsequent oral contract which has thus been incoporated into and made a part of the original one."

It follows that no express provision in a building contract that changes may be made without abrogating the special contract is necessary in order to authorize changes by mutual agreement of all parties being made without that effect. Such a provision is necessary to avoid such effect only where the changes are made by one of the parties without the consent of the other. See to same effect 9 C. J. 717 et. seq.

The specifications, indeed, contained the specific provision that the owners might, "without invalidating the contract, make changes by altering, adding to or deducting from the work." As held in *Bozarth* v. *Dudley, supra,* (43 Am. Rep. at p. 375): " * * * the jury * * * were told that since the contract provided for deviations and changes of plan, they could not properly draw the conclu-

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sion that the contract was abrogated merely from such deviations and changes;" and this was held to be a correct instruction. But since, as we have seen, an express stipulation is not necessary to be made in a building contract in order to authorize changes of plan by the owner without invalidating the original contract, where the contractor assents to such changes, when such changes have been made by mutual consent, it is just as if they had been made by direction of the owner under an express stipulation in the parol contract permitting him to so direct. So that in the case in judgment the instruction under consideration, if proper to have been given at all, should have contained a further provision to the effect that, as there was no controversy as to the fact that the changes were assented to by the contractors, the jury could not properly draw the conclusion that the contract was wholly abrogated merely from the fact that the changes were made.

4. It should be noted, however, that as there were some controverted questions in the case, with respect to what items of the work done were covered by the original contract, which the specifications covered, but which the plans, from their very nature could not and did not cover, the jury should have been instructed with respect to the practical bearing the fact that the specifications were or were not a part of the contract had on their verdict, so that they might have had that subject in mind in arriving at their verdict, and have ascertained what the fact was in respect to that matter.

It results from what has been said that a new trial will have to be awarded.

2 }

5. On a new trial the liability of Warren will have to be ascertained, first, by deducting from the original contract price of $21,000.00, plus the expense of the rip-sawed flooring, the reasonable saving of expense to the contractors due to the omissions, aforesaid, at the times they were

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made, which will fix what must be regarded as the contract price so far as Warren is concerned, next, by finding what was the reasonable expense to the contractors incurred for the additions, aforesaid, at the times they were made, and for this Warren should be held liable to the contractors, in addition to the contract price fixed as aforesaid, subject, of course, to proper credit for the payments which have been made.

The liability, or non-liability, of the other owners, to be ascertained upon a new trial, involves more complicated problems. None of them executed the written contract; and there is no evidence tending to show that they authorized Warren to execute it, so as to obligate them for a greater maximum price than $20,000.00. Whether the respective owners, other than Warren, afterwards obligated themselves for any greater price, depends on whether they ratified what Warren did under such circumstances, or their own conduct was such, in directing the changes in plans, or in accepting the completed work, as that, under the circumstances, it was just and equitable that they should be liable to the contractors for a greater maximum price than $20,000.00.

As bearing on these questions, it must be borne in mind that none of the owners could bind the others to any agreement with the contractors, express or implied, merely because of their relationship as co-owners.

As said in 17 Am. & Eng. Enc. of Law, (2nd ed.), p. 672:

"Co-tenants may, of course, render themselves jointly liable to third persons by contracting jointly in respect to the common property. But one tenant in common cannot bind his co-tenant personally nor by any unauthorized agreement or act in respect to the common property. There is no relationship existing between co-tenants, as between partners, which will render the acts of one co-tenant respecting the common property binding on the others. No

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action of one or more of several tenants in common can impair the rights of the other co-tenants.

As said in 38 Cyc. 101:

"Under ordinary circumstances neither tenant in common can bind the estate or person of the other by any act in relation to the common property, not previously authorized, or subsequently ratified, for co-tenants do not sustain the relation of principal and agent to each other nor are they partners and the rule which prevents them from binding each other applies with greater force after expiration of the co-tenancy. A contract by one tenant in common in relation to the whole estate being voidable at the election of his co-tenants not joining in said contract. But the contracting co-tenant may himself be bound. Even where some previous authority or agency is conferred upon a tenant in common, his acts must be strictly within the authority, *third persons dealing with a tenant in common being bound at their peril to ascertain his authority to bind his co-owners.*" (Italics supplied).

And the following must also be borne in mind:

Both instructions No. 1 and No. 2, given by the court in the instant case, were erroneous in their reference to the effect of the mere acceptance, use and enjoyment of the building after completion, without some further explanation of what was meant thereby. Those instructions give too much effect to the mere naked occupation of the building after completion. That is a circumstance to be considered, but it is not, in itself, either conclusive or presumptive evidence of acceptance, in the true meaning of that word in such cases. The use and enjoyment of one of a building erected on his land, rests upon a different footing from the acceptance of a chattel, in so far as concerns the implied promise which the law will supply in the respective cases. Building contracts are different in this particular from contracts for chattels. The use of the terms "accepted" and "enjoyed the use and benefits" in such in-

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structions as these under consideration, without further explanation of their meaning, is plainly misleading in such a case as that in judgment.

As said of building contracts, in *Bozarth* v. *Dudley, supra,* (44 N. J. L. 304, 43 Am. Rep. 373, 376-7): "Such a contract deals with a subject matter of a peculiar nature. When an agreement for the manufacture of a chattel out of materials furnished by the maker is not performed according to its terms, the remedy of the party for whom it is made seems perfect. And the rejection of the chattel, while completely protecting him, does no injustice to the maker, for it leaves in his hands the materials with which his labor has been united. But when, under a contract for building, labor and materials of the builder are put into an edifice immovably fixed to the lands of another, and the title to which goes with such lands, the right of rejection, while it may seem theoretically to exist, is difficult to enforce in practice, without apparent injustice to one party or the other." The well considered and able opinion in that case thereupon proceeds to point out the different holdings of the courts in England and in this country, which the considerations mentioned have produced, under differing circumstances. The opinion thereupon continues as follows:

"The rule most agreeable to the principles governing contracts is, it seems to me, this: When a contract for erecting a building has not been so performed that a recovery can be had thereon, a recovery in assumpsit, upon the common counts for work and materials furnished in the erection, will only be permitted when the owner has accepted the building erected. The view that assumes acceptance from the mere fact that the edifice adds value to the land on which it stands, in my judgment unduly restrains the force of the contract of the parties, and deprives the owner of the right to reject an edifice not in substantial conformity with its terms * * *.

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"Such acceptance by the owner may be express or implied from his conduct. It seems well settled that mere occupancy of the building by the owner, while appropriate, is neither presumptive nor conclusive evidence of acceptance. The reason is obvious. The building belongs to the owner of the land on which it stands. As said by Lord Campbell in *Munro* v. *Butt*, * *, the owner cannot be appropriately said to take possession of the building, for he has not been out of possession of that which is thus affixed to his own land."

This does not mean, however, that the taking possession of a structure, without objection to its construction, may not, under some circumstances, amount to such an acceptance of the work and materials that the law will imply a promise to pay therefor on a *quantum meruit* or *quantum valebat*. *Atlantic & D. R. Co.* v. *Delaware Const. Co.*, 98 Va. 503. Silence, under such circumstances as reasonably misleads another to his prejudice, is conduct, from which the law will supply a promise, which will be as binding as if it had been put into words by the person affected.

Touching the enquiry whether there is any liability on the part of the owners, respectively, other than Warren, and if so upon which, if not upon all of them, the instructions, upon a new trial should explain to the jury the peculiar features of the law above mentioned, which, otherwise, they are likely to overlook to the prejudice of the owners in such a case, and be so framed that the jury may be left at liberty, if the evidence shall warrant it, to return differing verdicts for or against the several owners.

There are two other questions which arose in the former trial, touching the admissibility of certain questions on cross-examination, which are the subjects of assignments of error on the present appeal, which may arise on a new trial, and which, therefore, we will pass upon. They are as follows:

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6. Brinson, a witness for the owners, testified, as an expert, to the expense of the omissions and additions aforesaid, and, on the subject of his qualification to testify as such an expert, testified that he had been engaged in the building business for fifty years. On cross-examination he was asked, over the objection of the owners, and was allowed to answer, the following question, namely: "Were you successful in business?"

The question was too broad in its scope to be properly admissible. As asked it involved a diversion of the minds of the jury into too wide a field of immaterial contingencies and collateral issues. The question should have been confined to the enquiry into whether the witness had previously made any serious mistake in such estimates as those about which he had testified.

7. While another witness for the owners was on the witness stand, named Phillips, he was asked, on cross-examination, over the objection of the owners, and was allowed to answer questions as to what was the business reputation and standing of a number of the sub-contractors, who furnished labor and materials for the work in controversy.

The business reputation and standing of these contractors was not in issue in the case, as an original proposition; and no effort had been made by the owners, by cross-examination, or otherwise, to impeach such reputation, so as to put it in issue. Therefore the questions under consideration and the answers thereto were inadmissible in evidence. *Reynolds* v. *Richmond etc. Co.*, 92 Va. 400; Greenleaf on Evidence, (15th ed.) sections 54-5.

As aforesaid, a new trial will be awarded, but upon such trial the fact that the original contract has not been entirely abrogated shall be taken as concluded, and the trial shall be had upon all other questions which have arisen or may arise in the case.

Reversed and a new trial granted.

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WAY *v.* BAYDUSH.

(*Wytheville, June 15, 1922.*)

1. CONTRACTS.—Construction of Building—Sub-Contractor—Statute of Frauds—Promise to Pay Debt of Another—Original and Collateral Promises—Instructions.

Error to Circuit Court of city of Norfolk.

Reversed.

Thos. W. Shelton and *Alfred Anderson,* for the plaintiff in error.

Willcox, Cooke & Willcox, for the defendant in error.

BURKS, J.:

E. C. Sharrar contracted to build for B. Baydush an apartment house and store for the sum of $17,800. Sharrar was the general contractor and was to furnish all the materials and erect the building according to plan and specifications. Sharrar, by verbal contract, employed S. H. Way, (the plaintiff in error), to do the plastering at $1,840. According to the testimony of Way, when the building was ready for the plastering he did not begin work, but remained away because he had heard that some one else had docketed a mechanic's lien against Sharrar and wished to see how things would develop before beginning to work for him. On October 7, 1919, Baydush came to his house between 6 and 7 o'clock in the evening and said to him "that he had leased the store to D. Pender Grocery Company, and it had to be delivered the 15th of the month. That was on the 7th then, and I was doing a job at Larchmont, and I did not care to give it up until I had finished, and Mr. Baydush seemed to be in a hurry, and he said to me, 'If it is money trouble you are hanging back on, you go ahead and finish that work, and look to me for the pay.'" He was not in a hurry about getting

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there and was hanging back on account of money, and would not have done the work but for the above promise from Baydush, but after that promise did commence the work and finally completed it, and it was for the work so done and materials so furnished that the present action was brought. Most of these statements of Way were denied by Baydush, but that is immaterial for the present purpose. At the trial there was a verdict for the defendant as a result of an instruction given at the instance of the defendant, and the refusal to give another instruction at the instance of the plaintiff. The ruling of the court on these instructions was duly excepted to, and is the basis of the assignments of error in the case.

The instruction given at the instance of the defendant and over the objection of the plaintiff was as follows: "The court instructs the jury that the promise relied on in this suit was to pay the debt of E. C. Sharrar, and unless the same was in writing the plaintiff cannot recover in this motion."

The main contention of the plaintiff in error is that this instruction took away from the jury the determination of a question that it was their special province to decide. Where there is any doubt as to what the "promise relied on" is, in view of the surrounding facts and circumstances, in the light of which it is to be construed, that is true, (*Kanter* v. *Hofheimer*, 118 Va. 625, 11 Va. App. 481; *Alphin* v. *Lowman*, 115 Va. 441, 8 Va. App. 509; *Conrad* v. *Ellison*, 120 Va. 458, 13 Va. App. 456; 9 Ann. Cas. 895, 897); but where there is no doubt, the construction of the promise is one of law for the court. *Forbes & Co.* v. *Southern Cotton Oil Co.*, 130 Va. —, 23 Va. App. 476; *Goldie &c. Co.* v. *Bothwell*, (Wash.) 121 Pac. 60; 25 R. C. L. 490, sec. 73; 9 Ann. Cas. 895-7. It is manifest that the trial court took the view that the promise was definite and certain, and, waiving the conflict in the testimony and giving the plaintiff the full benefit of his testimony,

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regarded the promise to be construed as that couched in the language, "If it is money trouble you are hanging back on, you go ahead and finish that work, and look to me for the pay." This language, used under the circumstances hereinbefore detailed, the trial court construed to create a secondary liability, or a contract of guaranty, on the part of Baydush, and hence unenforceable unless in writing.

Way had reason to doubt the solvency of Sharrar, the general contractor, and was "holding back on account of money," when Baydush came to him voluntarily and made the promise relied on.

"The real character of a promise does not depend altogether on the form of expression, but largely upon the situation of the parties and upon whether they understood it to be a collateral or direct promise." *Davis* v. *Patrick*, 141 U. S. 479.

"The surrounding facts and circumstances as well as the language used are important elements in determining the nature of the promise." *Bank note Co.* v. *Shrader*, 70 W. Va. 475.

"It sometimes happens, where real estate is being improved under a contract with the owner, that the contractor sublets the work or part thereof and after the default of such contractor, to induce the subcontractor to continue the performance of his contract, the owner promises to pay or see that the subcontractor is paid for his work. In such a case it seems, as a general rule, as respects work done by the subcontractor on the faith of such promise, that the promise is not regarded as within the statute, it being considered that the work was continued on the credit of the promisor. And it has been said that the principle which the well reasoned cases establish is this: where the owner of property undertakes to pay for work and materials to be subsequently done and furnished by a

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subcontractor in order to secure the completion of a building in a case where the principal contractor has failed to carry on the work, the promise is an original one, and not within the statute; this principle is intrinsically just and its enforcement does not in the slightest degree tend to the mischief the statute was intended to repress." 25 R. C. L. 522.

In *Emmerson* v. *Slater*, 22 How. 28, it was held that, "whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidently have the effect of extinguishing that liability." This holding has been followed in a large number of Federal and State courts, as will appear by reference to 5 Rose's Notes (Rev. Ed.) 247-9, and other books of reference. See also note 126 Am. St. Rep. 494; *Howell* v. *Harvey*, 65 W. Va. 314; *Gibson Co.* v. *Cincinnati Steam Heating Co.*, 128 Ind. 247, and cases cited; *Cincinnati Traction Co.* v. *Cole*, 258 Fed. 169.

It is unnecessary for us in the instant case to go as far as the court went in *Emmerson* v. *Slater*, *supra*, as there are circumstances under which the doctrine there announced should probably be qualified. 1 Williston on Contracts, secs. 470, 472.

In *Gibson Co.* v. *Cincinnati Steam Heating Co.*, 128 Ind. 240, the principal contractor for a building undertook to carry on the work and the owner undertook to pay for work and materials to be subsequently done and furnished by a subcontractor in order to secure the completion of the building. The promise was not in writing but was a verbal acceptance of a written proposition, and it was held that the promise was an original one, and that no

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writing was necessary. It was said that the principle involved was intrinsically just, and that its enforcement does not in the slightest degree tend to the mischief the statute of frauds and perjuries was intended to repress. The case is chiefly valuable for its very full discussion and citation of authorities on the subject of when a promise is original and when it is collateral.

In *Crawford* v. *Edison*, 45 Ohio St. 246, a contract had been made by Smith to furnish materials and build a house for Crawford. Smith employed Edison to put on the roof and do certain other work for a stipulated sum, to be paid when the work was completed. When Edison had done about two-thirds of the work, Smith abandoned the job and left the country without paying Edison or making provision for paying him. Thereupon Edison applied to Crawford to know what was to be done about his bill, and stating that he would not go on further with the work unless he was paid. He testified that Crawford replied: "Mr. Edison, you need have no fear about your pay. You go right along and complete your job. There is enough owing to Smith and I will pay you." And later on the same day: "You need not have any trouble about that matter, as I will pay you as I said." Crawford denied making any such promise, but his wife testified that Crawford told Edison to go on and put up the spouting and he would see him paid from then on anyway. Edison went on and completed the job and charged the amount to Crawford. It was held that the promise in this case was not collateral to pay the debt of another, but was an original promise for Crawford's own benefit, and was unaffected by the statute of frauds. To the same effect see, *Nelson* v. *Boynton*, 3 Met. 400, opinion by Shaw, C. J., and *Clifford* v. *Luhring*, 69 Ill. 401.

In *Hall* v. *Alford*, 105 Ky. 664, a general contractor for a building was getting behind with his payments when a subcontractor applied to the owner to know whether he

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was safe about getting his money from the general contractor, and said to the owner that if he would not see that he got his money he would quit work and take other proceedings; thereupon the owner told him "not to get scared, but to go ahead with the work, and that he would see that all subcontractors were paid for the work performed, and the material men for materials furnished:" that in reliance upon this promise he went on and completed his job. In a suit by the subcontractor against the owner it was held that the promise was a distinct and independent obligation, for which he received a valuable consideration, and not within the statute of frauds.

In *Reisler* v. *Silbermintz,* 90 N. Y. Supp. 967, the plaintiffs were subcontractors under S. to do certain iron work for the owner, who accepted an order drawn by S. for the amount due the subcontractors, conditioned upon the performance of the contract by S., who thereafter abandoned the contract; whereupon the owner orally agreed to pay the subcontractors the whole value of their work in consideration of their finishing the job, and it was held that the owner's promise to pay was an original undertaking and not within the statute of frauds.

Howell v. *Harvey,* 65 W. Va. 310, contains a valuable discussion of many of the cases on the subject now under consideration. In that case Peyton contracted with Harvey to furnish material and build a house for him. Peyton sublet a part of the work to Howell, who proceeded with his work until June, 1899, when his men quit work says that on Harvey's return to Huntington he asked Ho- because Peyton had not paid him. Peyton failed. Harvey was away from home when the men ceased work. Howell well why the work was not going on, and he replied that Peyton had not paid him, and he could not pay his men, and they had quit. He further says that Harvey told him, "For God's sake go on with this work; finish this post office building, if you don't it will ruin us." Several other wit-

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nesses testified to the same effect. One witness says that he said that he would pay him every cent. It was held the benefit of the owner, and was not within the statute that this promise was an original undertaking made for of frauds; and further, that it was immaterial that the original promisor (the general contractor) was not released.

There are many cases to the same effect, but the citations made are deemed sufficient.

In *Noyes* v. *Humphreys*, 11 Gratt. (52 Va.) 636, the prior cases in this jurisdiction are cited and it appears from them that the holding in this jurisdiction is that if the original contractor remains liable and the undertaking of the new party is merely that of surety or guarantor, the undertaking of the latter is collateral and within the statute of frauds. We do not propose to depart from that holding in this case. In the case at bar, the evidence was conflicting on the subject of the promise, but the trial court instructed the jury "that the promise relied on in this suit was to pay the debt of E. C. Sharrar, and unless the same was in writing the plaintiff cannot recover in this motion." Now the promise relied on by plaintiff was, "If it is money trouble you are hanging back on, you go ahead and finish that work and look to me for the pay." These words, of themselves, do not import any collateral undertaking on the part of Baydush, but just the contrary. Way had an oral contract with Sharrar to do the plastering, but had not entered upon the performance of the contract. Having heard that a mechanic's lien had been taken out on another house built by Sharrar, Way was awaiting results before he would enter upon his contract with him. Baydush evidently had heard something of the same kind, for he went in search of Way after dark and finally found him at his home and said to him, "If it is money trouble you are hanging back on, you go ahead and finish that work and look to me for the pay." Upon this promise Way

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went to work the next day, but would not have gone except upon this promise. If this were all, the instruction of the court would have been plainly erroneous. But defendant in error relies upon the fact that, after Mrs. Way, wife of the plaintiff in error, had testified in chief that Baydush had said, "If the money is what you are holding back on go on with the work, I need it and I am in a hurry," she testified on cross-examination as follows:

"Q. You testified downstairs in the other court?

"A. Yes, sir.

"Q. At the other trial of this case?

"A. Yes, sir.

"Q. At that trial, you testified as follows: 'Yes, sir. He asked Mr. Way how soon he can start, and he told him he was very busy, and Mr. Baydush said, "If it is money matters you are standing on, I will be responsible for the money," 'That was what he said?

"A. Yes, sir."

In addition to this the defendant in error relied upon the fact that Way attended certain meetings of the creditors of Sharrar after he had thrown up the job, and after the building had been completed. Way testified as to the object of these meetings and why he attended, and undertook to show that his conduct did not in any way show that he was looking to Sharrar for his money. On this subject the evidence was conflicting. The testimony simply raised a doubt as to whether Way was still looking to Sharrar for his money. This doubt made the question one of fact for the jury, and it was error on the part of the trial court to tell the jury that the promise relied on in this suit was to pay the debt of E. C. Sharrar. The court should have instructed the jury that if they believed from the evidence that the promise relied on in this suit was to pay the debt of E. C. Sharrar, there could be no recovery by the plaintiff, unless the promise was in writing, but that if they believed that Way did the work solely upon the

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promise of Baydush to pay for it, and did not look to Sharrar for payment after the promise of Baydush to pay therefor, then the promise of Baydush was an original undertaking on his part and it was not necessary for the promise of Baydush to have been in writing in order to entitle the plaintiff in error. *Mankin* v. *Aldridge*, 127 Va. 761.

The following instruction was tendered by the plaintiff "The court instructs the jury that if you believe from the evidence that the said Baydush promised to see that the said Way was paid for the work in question and that the object of said promise was to subserve some pecuniary or business purpose of said Baydush, involving either a benefit to himself or damage to the said Way, his promise is not within the statute of frauds and you shall find for the plaintiff." The court committed no error in refusing this instruction. *Noyes* v. *Humphreys*, 11 Gratt. (52 Va.) 636, and cases cited.

For the error of the court in giving defendant's instruction No. 1 its judgment must be reversed, and the cause remanded for a new trial.

Reversed.

BARKER v. COMMONWEALTH (No. 71.)

(*Wytheville, June 20, 1922.*)

1. INTOXICATING LIQUORS.—Indictment—Bill of Particulars.
2. IDEM.—Evidence—Time and Place of Offense—Sufficiency of Proof.

Error to Circuit Court of Lee county.

Affirmed.

Pennington & Pennington, for the plaintiff in error.

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Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile*, for the Commonwealth.

PRENTIS, J.:

The accused has been convicted of the illegal sale of ardent sipirits, sentenced to imprisonment for six months, and fined $500. He assigns and relies on two errors.

1 }

1. Before the trial began he moved the court to require the attorney for the Commonwealth to furnish him with a bill of particulars. As the indictment was in the form authorized by section 7 of the Prohibition Act (Acts 1918, p. 578), he was entitled to know specifically for which of the several offenses with which he was charged he was to be prosecuted. *Pine & Scott* v. *Com'th*, 121 Va. 812, 14 Va. App. —, 93 S. E. 652. In response to this motion, the prosecutor stated that he would prosecute only for three of the offenses charged in the indictment, namely, for selling, transporting and giving away ardent spirits. The specification as to the sale is as definite as would have been necessary in an indictment for the illegal sale of ardent spirits before the enactment of the statute authorizing the form of indictment now permissible under the prohibition act. It seems clear that the bill of particulars now necessary under such an indictment should not be required to be more specific than a separate indictment or count for such an offense. It is admitted by the attorneys for the accused that in such an indictment "it is not necessary to allege a sale to any particular person at any particular time, so long as the time is within one year prior to the finding of the indictment," and this is well established by the precedents in this State. *Dove* v. *Commonwealth*, 2 Va. Cas. (4 Va.) 26; *Hulstead* v. *Commonwealth*, 5 Leigh (32 Va.) 724; *Fletcher* v. *Commonwealth*, 106 Va. 846, 56 S. E. 149; *Runde* v. *Commonwealth*, 108 Va. 873, 2 Va.

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App. 291, 61 S. E. 792; *Clopton* v. *Commonwealth*, 109 Va. 818, 2 Va. App. —, 63 S. E. 1022; *Dix* v. *Commonwealth*, 110 Va. 907, 3 Va. App. — 67 S. E. 344.

2 }

2. He also complains that the court erred in refusing to set aside the verdict upon the ground that the evidence was of such a vague and uncertain character as to time and place that he might easily hereafter be indicted, tried and convicted on the same state of facts. As to this it is only necessary to say that the evidence sufficiently identifies three illegal sales of ardent spirits to the same purchaser within the year, the places of such sales and the presence of another witness on two of the occasions. Of these sales he has been convicted, and this conviction can be pleaded in bar of any future prosecution for either of these offenses. *Hitt* v. *Commonwealth*, 131 Va. —, 24 Va. App. 541, 109 S. E. 597.

Affirmed.

BARKER *v.* COMMONWEALTH (No. 72.)

(*Wytheville, June 20, 1922.*)

1. INTOXICATING LIQUORS—Sale—Evidence.

Error to Circuit Court of Lee county.

Reversed.

Pennington & Pennington, for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile*, for the Commonwealth.

PRENTIS, J.:

The accused has been convicted of the illegal sale of ardent spirits, sentenced to imprisonment for six months and fined $200.

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It is only necessary to consider one of the errors assigned, and that is that the verdict is without supporting evidence. There were two witnesses. One in substance testified that he knew the accused; that he went to a car in the dark; that there were three or four men there, but he did not know who they were; that he bought two pints of whiskey, reaching into the car to get it; and that he did not recognize the accused as being present, and did not know that he had bought any whiskey from him within twelve months prior to the date of the indictment. The other witness, upon whose testimony the accused had just been convicted of the illegal sale of whiskey, testified that he bought whiskey from him at other times than those to which he had testified in the previous trial, but could not remember the times or dates of such other purchases. After this, upon being further pressed he said that the other purchases were "within the last twelve months." Inasmuch as the indictment was found May 6, 1921, and the trial occurred September 16, 1921, this doubtful evidence falls short of showing that these other sales by the accused occurred within twelve months prior to May 6, 1921, as charged in the indictment.

The verdict will therefore be set aside as unsupported by the evidence, the judgment reversed, and the case remanded for a new trial if the Commonwealth shall be so advised.

Reversed.

JENNINGS v. COMMONWEALTH.

(Wytheville, June 20, 1922.)

1. INTOXICATING LIQUORS.—Selling and Transporting.—Bill of Particulars.—Permission to Amend Bill of Particulars.
2. IDEM.—Form of Verdict.

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Error to Circuit Court of Wythe county.

Affirmed.

Robt. Sayers and *S. B. Campbell,* for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

PRENTIS, J.:

The accused has been convicted both of illegally selling and illegally transporting ardent spirits, sentenced to six months imprisonment and fined $500.

1 }

1. He assigns as error that the court permitted the Commonwealth's attorney, during the trial, to change the bill of particulars, and election, from keeping ardent spirits for sale, to the charge of illegally transporting ardent spirits. These are the essential facts upon which this assignment is based: The accused did not ask for a bill of particulars, which he had the right to demand before proceeding with the trial. After ten witnesses had testified for the Commonwealth, and the prosecutor had announced that he would rest, the accused, by his attorney, "stated to the court that the Commonwealth's attorney in his opening statement had announced that he expected to prove a sale of whiskey to Poole and others, and a keeping for sale of whiskey, and asked that the Commonwealth be required to elect upon what charges in the indictment it wished to go to trial, and that the Commonwealth furnish a bill of particulars of the offenses for which it would prosecute the defendant. Thereupon the attorney for the Commonwealth announced that he would ask a conviction on the charge of selling liquor and of keeping liquor for sale and no other. That he would ask for a conviction of selling under the first count of the indictment, and for keeping for sale under

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the second count. Whereupon the attorney for the defendant stated that this would be considered a sufficient bill of particulars and it need not be reduced to writing, and requested the court to allow time to interview a witness. After returning into court the defendant, by his attorney, called a witness to the stand, and thereupon the attorney for the Commonwealth asked leave of court to introduce more evidence." The court then permitted the prosecutor to recall one of its witnesses, who thereupon testified to an illegal purchase of whiskey by the accused in an adjoining county, and to its illegal transportation by the accused to his home in Wythe county. Whereupon the prosecutor asked and was granted leave to change the bill of particulars by withdrawing the charge of keeping whiskey for sale, and substituting therefor the charge of illegally transporting whiskey, under the second count of the indictment; to which the accused thereupon excepted, the accused introduced his witnesses, and the trial proceeded.

This question arose in *Dix's Case*, 110 Va. 908, 3 Va. App., 67 S. E. 344. The accused had been indicted for the illegal sale of intoxicating liquor, and made a motion to require the Commonwealth to elect some specific sale before the introduction of any testimony on behalf of the Commonwealth, and this is there said:

"This question has been considered and settled by *Hatcher's Case*, 106 Va. 831, 55 S. E. 677. It is there said, citing Bishop's New Crim. Proc., sec. 462: 'The better view seems to be that that question should be left to the discretion of the trial judge, to be exercised with reference to the special facts of the case; but as Mr. Bishop says, whatever is done at the earlier stages of the trial, plainly, as a general rule, the election should be required before the prisoner opens his defense.'

"The record here shows that, at the conclusion of the Commonwealth's evidence, the court, in the exercise of its discretion, required the prosecuting attorney to specify the

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offense for which he would ask a conviction. This was done, and it was upon the specific offense then indicated that the conviction was had. In this the court followed the general rule of practice established in *Hatcher's Case*, and the record furnishes no ground for making this case an exception to that rule."

Even if the accused here did not waive his right to require a bill of particulars in this case by not asking for it before the trial began, he fails to disclose that he was in any way prejudiced by the amendment of the bill of particulars. The amendment was made before he introduced any of his witnesses, and while the trial courts should carefully guard the constitutional rights of accused persons, and prosecuting attorneys should be required promptly and frankly to inform them by bills of particulars for which one or more of the several offenses charged in the same count they are to be prosecuted, still such matters generally rest in the discretion of the trial judge, and will not be reviewed here unless abused to the prejudice of the accused.

Under the circumstances here shown, the trial court committed no error in permitting the amendment of the bill of particulars.

2 }

2. The jury returned a verdict in these words: "We, the jury, find the prisoner Ellis Jennings guilty as charged in the within indictment on the two counts and fix his punishment at six months confinement in jail and a fine of Five Hundred Dollars ($500.00) for the two offenses.

This verdict, it is said, is improper in form, indefinite and insufficient, and that the court refused to set it aside is assigned as error. That it is incorrect in form is true, but that it is sufficient in substance is also apparent. Its meaning is clear. The accused was prosecuted under the first count for the illegal sale, and under the second for the illegal transportation, of ardent spirits, and the jury

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adjudged him guilty of both offenses. The penalty for each offense should have been separately fixed by the jury, but inasmuch as the penalty fixed by the jury for both crimes does not exceed the maximum which might have been imposed for either, it is sufficient.

3. The third assignment of error is that the verdict is contrary to the evidence. We do not deem it necessary to recite the evidence relied on by the Commonwealth, but think it sufficient to say that we agree with the learned trial judge in his view that it is sufficient to sustain the conviction.

Affirmed.

COOPER v. COMMONWEALTH (No. 75.)

(Wytheville, June 20, 1922.)

1. INTOXICATING LIQUORS—Indictment—Bill of Particulars—Sale—Time and Place—Evidence—Second Offense—Penalty.

Error to Circuit Court of Lee county.

Affirmed.

Pennington & Pennington, for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hanks, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

BURKS, J.:

The plaintiff in error, hereinafter called the accused, was convicted of a second offense of violating the prohibition law (Acts 1918, Ch. 388. p. 578), and sentenced to confinement in jail for twelve months and to pay a fine of $500. The petition for the writ of error assigns five errors, alleged to have been committed by the trial court. The

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fourth assignment of error is abandoned, and the petition admits that the fifth assignment raises the same question that is raised by the second.

The indictment contains two counts. The first count is the "omnibus count," charging the unlawful sale, transportation, etc., of ardent spirits. The second count charges that prior to the commission of the offense charged in the first count, to-wit, on December 12, 1919, the accused had been convicted of violating the prohibition law, and that the offense now charged was "a second offense committed by the said Richard Cooper, in violation of sections 3, 3a, 4 and 5 of chapter 388, Acts of 1918."

The first assignment of error is that when the case was called for trial, the accused called for a bill of particulars, and the prosecutor stated orally that he elected to prosecute for "selling ardent spirits." The accused, however, insisted that he should be informed of the time and place of such sale, but the court refused to require any further bill of particulars or fuller information. In this there was no error. *Barker* v. *Commonwealth*, decided to-day.

The second assignment of error is the insufficiency of the evidence to establish the first conviction. This was established by the production of the judgment of conviction showing that the accused had been convicted in the court in which the present trial was being had on December 12, 1919, "on an indictment for violation of the Mapp law (new case)," and sentenced to pay a fine of $50 and to confinement in jail for thirty days. "Mapp Law" is the common designation of the State prohibition statute, and the judgment of conviction was sufficient evidence of conviction of a violation of *some* provision of the prohibition statute. Under section 5 of the act (Acts 1918, ch. 388), a conviction of a prior violation of *any* provision of the prohibition act before the commission of the second offense was sufficient to warrant the penalty imposed by the jury by their verdict. That section declares: "Any person

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who shall violate any of the provisions of this act shall, except as otherwise herein provided, be deemed guilty of a misdemeanor, * * * . The penalty for any subsequent offense committed after the first conviction, which is not declared a felony by this act, shall be a fine of not less than one hundred dollars, nor more than five hundred dollars, and imprisonment in jail for not less than six months nor more than one year.

The only other assignment of error is, that the verdict was contrary to the law and the evidence. There was some confusion in the testimony as to the exact date on which the second offense was committed. H. Bishop, the main witness for the Commonwealth, produced a book in which he said he had gotten his wife to put down the date, and that date was January 31, 1921. But this witness testified: "I would not swear to the date, but will tell you the month (referring to book)—in January;" and on cross-examination: "We put it down with the intention of doing it right, but I would not swear it was right." Another witness for the Commonwealth, when asked if he had bought any whiskey from the accused within the last twelve months, stated that he was with Bishop when he bought it. The accused proved an alibi on January 31, 1921. The fact of the purchase was proved beyond reasonable doubt—indeed was not denied—and the time of the purchase presented a question for the jury, with whose finding, under the testimony, we cannot interfere.

We find no error in the judgment complained of and it is affirmed.

Affirmed.

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FLANARY v. COMMONWEALTH.

(Wytheville, June 20, 1922.)

1. INTOXICATING LIQUORS.—Pleading and Practice—Motion to Set Aside Verdict—Indictment—Time of Commission of Offense—Code, secs. 4876, 4879.

Error to Circuit Court of Scott county.

Affirmed.

W. S. Cox, for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hanks, Jr., and *Second Assistant Attorney-General Leon M. Bazile*, for the Commonwealth.

BURKS, J.:

The plaintiff in error was convicted of unlawfully transporting ardent spirits, upon an indictment which charged that the offense was commited on the .... day of ..... in the year nineteen hundred and ..... There was no demurrer or other objection to the indictment until after a verdict of conviction, which was abundantly suported by the testimony. The plaintiff in error then moved to set aside the verdict as contrary to the law and the evidence, but the motion was overruled, and this is the only error assigned.

The motion came too late. Section 4879 of the Code provides that, "Judgment in any criminal case shall not be arrested or reversed upon any exception or objection, made after a verdict, to the indictment or other accusation, unless it be in violation of the Constitution." The revisors, in their note to this section, say: "As this section stood before the revision, it read as follows: 'Judgment in any criminal case, after a verdict, shall not be arrested or reversed upon any exception to the indictment or other accusation, if the offense be charged therein with sufficient

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certainty for judgment to be given thereon, according to the very right of the case.' The new language is intended to be broader than the old, preserving, however, as it must, constitutional rights."

Certainly, the language of the indictment is sufficiently certain to enable the court to give judgment thereon "according to the very right of the case," and does not violate any constitutional right of the accused. It is true, as claimed, that he had the right to demand "the cause and nature of his accusation," but he made no such demand by demurrer, objection, motion to quash, calling for a bill of particulars, or in any other manner, and the indictment accurately charged him with the offense in every particular except as to the date of the commission of the offense. If this objection had been raised, it could have been corrected at the bar by the prosecuting attorney on mere motion. Code, section 4876, provides: "An amendment of any defect in an indictment or presentment for a misdemeanor that does not change the nature of the offense charged, may be made by the court before which the trial is had, at any time before judgment is entered; but if such amendment operates as a surprise to the defendant, he shall be entitled, upon request, to a continuance of the case."

Technically, the indictment should have alleged the commission of the offense within twelve months prior to the finding of the indictment, and the failure to make such allegation was fatal to the indictment, independently of statute, but section 4879 was intended to meet such cases, and to require persons charged with crime to assert their rights and to make their defenses before verdict, and thereafter to cut off all defenses not made before verdict unless prohibited by the Constitution. The Constitution gives to the accused the right to demand the cause and nature of his accusation, and this right cannot be taken away from him, but there is no inhibition on the legislature to

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fix a stage of the procedure beyond which he cannot go in the assertion of his constitutional right. He must be given a full and fair opportunity of asserting his right, but after this has been afforded him and he has failed to avail himself of it, he cannot complain. Within the limits mentioned, the order in which defenses shall be presented, and the stages at which they may be forbidden, is entirely within the powers of the legislature. In the instant case, the accused having taken his chances before the jury and lost, cannot now raise the objection that the indictment is defective for failure to state the time of the commission of the offense.

The judgment of the Circuit Court of Scott county is, therefore, affirmed.

Affirmed.

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REHEARINGS.

"*When Court of Appeals may rehear and review case decided by it; when application therefor to be made; where rehearing, etc., to take place; where decision entered.*—The Supreme Court of Appeals on the application of a party shall rehear and review any case decided by the said court if one of the judges who decides the case adversely to the applicant certifies that in his opinion there is good cause for such rehearing. If the case was decided within the last fifteen days of the term the application shall be made before the end of the said term or within fifteen days after the commencement of the next term, wherever held. In all other cases the application shall be made during the term at which the decision was made and within fifteen days after the entry of the judgment. Such rehearing and review may be at any place of session, and the judgment, decree, or order made thereon shall be entered on the order book where it is made, and if not made at the place of session where the case was pending at the time it was originally determined, it shall be certified to the clerk of the court at the place of session where the case was originally pending as aforesaid, who shall forthwith enter the same on his order book and transmit a certified copy thereof to the clerk of the court below to be by him entered as provided by section sixty-three hundred and sixty-nine." Code 1919, sec. 6372.

N. B.—All opinions printed in this number are subject to rehearings which may be granted under the above statute.

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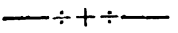

JUDGES.

HON. JOSEPH L. KELLY, President.

HON. ROBERT R. PRENTIS. HON. MARTIN P. BURKS.

HON. FREDERICK WILMER SIMS. *HON. JESSE F. WEST.

*Elected to succeed Hon. Edward W. Saunders, died December 16, 1921. Judge West was seated February 1, 1922.

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VIRGINIA APPEALS

APPALACHIAN POWER COMPANY *v.* BURRESS.

(*Staunton, September 21, 1922.*)

1. STREET RAILWAYS.— Automobiles — Collision — Negligence—Evidence—Appeal and Error—Code, sec. 6363.

Error to Circuit Court of Tazewell county.

Affirmed.

R. E. Scott, for the plaintiff in error.

Greever, Gillespie & Divine, for the defendant in error.

PRENTIS, J.:

There was a collision between a street car of the Appalachian Power Company and a motor truck driven by V. L. Burress, in which the truck was damaged and he was slightly injured. He brought an action, alleging that the accident was due to the negligence of the company, and upon the trial there was a verdict in his favor, upon which the court entered judgment.

The only error apparently relied on here by the company is the refusal of the court to set aside the verdict upon the ground that it was contrary to the law and the evidence, without supporting evidence, and plainly wrong. There was a conflict in the testimony which is usual in such cases, and if the jury had found a verdict in favor of the company it would not have been disturbed here.

The evidence relied upon by the plaintiff to sustain the judgment may be thus summarized: The accident occurred in the town of Graham, Va., at or very near a street cross-

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ing. The plaintiff was going west, driving on the right side of the street on the north side of the tracks of the company. In order to avoid an automobile which was moving in the same direction but which turned to enter a garage on the north side of the street, the plaintiff veered in his course and drove his machine upon the track of the company—that is, the left front and hind wheels crossed the north rail of the track and the truck continued to move forward. The plaintiff soon saw the street car approaching from the opposite direction. In due season he endeavored to drive the truck off of the track by turning to the right, but failed because the front wheel, which was between the rails of the track, failed to climb the rail, and skidded. He then reduced the speed of the truck, but was still unable to get his machine from between the rails, and, while continuing his efforts to do so, was struck by the street car. According to his testimony, he did everything in his power to get the motor truck out of the way of the approaching street car, while it continued to come forward at an excessive rate of speed, greatly in excess of the maximum speed limit prescribed by the town ordinance; that, although his position of peril was realized by himself, was apparent to other witnesses, and should have been apparent to the motorman of the company, he negligently failed to reduce the speed of the car, or to stop it, and made no effort to avoid injuring him, although his peril and his own ineffectual efforts to extricate himself therefrom were so apparent, until it was too late to avoid the collision.

All of this evidence, which tends to show the negligence of the motorman (except the existence of the city ordinance), is contradicted by the defendant's witnesses, and there is much in the attendant circumstances which would have justified the jury, if they had discredited the plaintiff's witnesses, in concluding that there was no actionable negligence on the part of the motorman of the street car.

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We are urged to set aside the verdict under section 6363 of the Code, and to enter judgment for the defendant, upon the ground that the judgment of the trial court is plainly wrong and without evidence to support it. The foregoing summary of the evidence relied on by the plaintiff is sufficient to show that this court would be violating both the letter and the spirit of that statute if we were to reverse this judgment.

We do not deem it necessary to discuss the question here raised by comparison with the recent cases cited and relied upon by the defendant's attorney—*Virginia Ry. & P. Co.* v. *Johnson,* 114 Va. 479, 76 S. E. 916, 7 Va. App. 294; *Va. Ry. & P. Co.* v. *Boltz,* 122 Va. 649, 15 Va. App. 518, 95 S. E. 467, and *Va. Ry. & P. Co.* v. *Harris,* 122 Va. 657, 15 Va. App. 525, 95 S. E. 403; *Stephen Putney Shoe Co.* v. *Ormsby,* 129 Va. 297, 22 Va. App. 241, 105 S. E. 563; *Buchanan* v. *Smith & Hicks,* 131 Va. 1, 24 Va. App. 360, 109 S. E. 227—because the facts in each of those cases can be easily distinguished from the evidence relied upon by the plaintiff here. The questions of fact presented in this case were properly submitted to the jury under the sharp conflict in the testimony, and their verdict is conclusive.

Affirmed.

APPALACHIAN POWER COMPANY *v.* HALE'S ADMINISTRATORS.

(*Staunton, September 21, 1922.*)

1. ELECTRIC COMPANIES.—Maintenance of Power Line—Fatal Injury—Negligence—Contributory Negligence—Failure to Keep Line in Reasonably Safe Condition—Proximate Cause—Evidence.

Error to Circuit Court of Smyth county.

Affirmed.

R. E. Scott, for the plaintiff in error.

John R. Pendleton, Geo. F. Cook and *Grover C. Worrell,* for the defendant in error.

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WEST, J.:

This is an action against the Appalachian Power Company to recover damages for the death of R. M. Hale, deceased. The jury returned a verdict in favor of the plaintiff for $7,500, and the court entered judgment accordingly. To that judgment this writ of error was awarded.

For convenience, the parties will be designated as plaintiff and defendant, with respect to their positions in the trial court.

The Appalachian Power Company is the owner of an electric power line in Southwest Virginia, which runs through Smyth county. The line is composed of a number of wires, each carrying 88,000 volts of electricity.

In November, 1920, a severe storm of sleet and snow caused one of these wires to break and fall to the ground on the land of Mrs. E. V. Horn. On the night of the break, the lineman and his helper temporarily repaired it by splicing in about fifty feet of additional wire between the broken ends and pulling the wire out to a tree forty-six feet from the regular location of the power line and fastening it to the tree by means of another wire running about ten or fifteen feet from the tree—insulators being used between the wire on the tree and the power line, thus pulled from its proper location. The two poles supporting the power line, where the break occurred, are 297 feet apart. The distance from the tree to the west pole is 252 feet, and from the tree to the east pole sixty-six feet. The line, at the point of repair, was so fastened together and to the tree that it sagged to within five feet of the ground at a point between the tree and the nearest pole to the west.

The line thus repaired was put back into service, and remained in this condition until Sunday, November 21st. On Saturday, November 20th, about eleven o'clock A. M., the plaintiff's intestate, R. M. Hale, who was employed by Mrs. Horn, was engaged in hauling wood from her land, where the break in the power line occurred. Mrs. Clara James,

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a daughter of Mrs. Horn, was assisting him in piling and loading the wood. Deceased had hauled several loads, and while he was gone with a load Mrs. James brought some wood together in a pile, near the point of the accident. Upon his return, and after stopping his team at a point indicated by Mrs. James, the deceased walked toward the power line, and, possibly, in attempting to go under the sagging wire, either came in contact with it or came so near to it that the electricity jumped to him and burned him so severely that, as a result thereof, he died the next morning.

The negligence charged in the declaration consists in the defendant wrongfully and negligently permitting its light and power line to sag within four or five feet of the ground, and permitting the said wire, charged with 88,000 volts of electricity, to remain in said position for a long period of time, to-wit, six days. The defendant, in its grounds of defense, relies upon the contributory negligence of Robt. M. Hale, the plaintiff's intestate, as a defense to the action.

The plaintiff's right to recover must depend upon the answers to two questions:

1. Was the defendant guilty of negligence which was the proximate cause of the death of the plaintiff's intestate; and

2. Was the plaintiff's intestate guilty of negligence which contributed to or directly brought about his injury?

(a) Was the defendant negligent?

It is admitted that one of the wires in the defendant's high-tension electric transmission line, where it crossed the Horn farm, was broken by the weight of an unusually heavy sleet. The sleet occurred, according to some of the witnesses, on Monday, November 15th, or Tuesday, November 16, 1920. The defendant's lineman, King, testified that when the sleet broke the line the company called him out to locate the break, and that he located it and finished repairing it on Wednesday night, November 17th, about

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twelve o'clock, instead of Monday or Tuesday night, according to some of the testimony.

King's assistant, Medley, testified that the ice on the wire was about an inch and a half thick when they repaired the line. B. B. Roberts testified that the sleet came on Monday and that on Wednesday there was but little ice in Smyth county, except on the mountain. C. L. Jennings testified that he lived about a mile and a quarter from the Horn place, and that on Wednesday, November 17th, the ice was all off the trees at the foot of the mountain. Mrs. Clara James testified that the heavy sleet fell on Monday night, the week Hale was electrocuted. R. H. Sage also testified that the heavy part of the storm fell on Monday night.

King and his assistant, Medley, testified that they took a piece of wire and spliced the broken wire and pulled it out about fifty feet from the location of the main line and made it fast to a tree; that the wire spliced in was so securely fastened at each end of the broken wire that it could not and did not slip; that the wire running from the two poles towards the tree was partly covered with ice and drawn as tight as it could be drawn; that the power wires are so fastened to the individual poles that the line cannot slip, and that any slack which might exist between any two poles could not be projected over between other poles; that when they completed the repair work the line between the tree and the poles did not come nearer than thirteen feet to the ground. According to their testimony, while they cannot account for it, the wire sagged from thirteen feet to within five feet of the ground after the ice melted from the wire. This would seem physically impossible, as the removal of the weight of the ice ought to have caused the line to swing higher from the ground, and it must be true that if they measured the distance between the wire and the ground at all it was the wire between the tree and the east pole, and that in the darkness of the night they failed to measure the distance between the ground and the

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wire leading to the west pole, and that this wire was left within five feet of the ground, where it was found on the morning of the accident.

When the line was thus temporarily repaired, the lineman reported the fact to the managing office of the company and the current was turned on, and the line remained in that condition and was not permanently repaired and put in its proper position until Sunday, November 21st. The defendant's excuse for the delay was that the lineman and his assistant were hunting for telephone troubles and did not have the time to return to the Horn farm.

It was the duty of the defendant to employ a sufficient number of men to keep the line in a reasonably safe condition, and on the occasion of breaks in the line to employ extra men, if necessary, for that purpose.

The fallen wire was in Mrs. Horn's pasture field, where her cattle and horses were kept, near her house, but the lineman failed to give notice thereof to her or her employees, either in person or by hanging a danger signal on the sagging line. She secured all of her fuel from that portion of her farm on the opposite side of the power line from her dwelling, and it was necessary to pass under the line in hauling it to the house. It was reasonably to be expected, if a high-power wire were left near the ground in a pasture where people and animals might come in contact with it, that injury might naturally and probably result therefrom.

Negligence and ordinary care are relative terms, and depend upon the circumstances or necessities of the occasion. What is ordinary care under one state of facts, under different conditions might be negligence. The care required must be in proportion to the danger to be avoided. The greater the danger, the greater must be the care. It cannot be said, as a matter of law, that, for the defendant to permit its transmission line, charged with 88,000 volts of electricity, to hang suspended within five feet of the ground for five or six days, in the pasture of Mrs. Horn, where her

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live stock and employees might come in contact with it, was not negligence.

Proof that the injury resulted from contact with such a wire and that the wire was out of its proper place with reference to both the ground and the location of the main power line raises a *prima facie* presumption that the company was negligent in the performance of its duty and throws upon it the burden of overcoming such presumption.

In 9 Ruling Case Law, p. 1221, the rule of evidence in cases of injury from electricity is stated as follows:

"The mere introduction of the facts surrounding an injury from electricity showing that such injury resulted from contact with live electric wires or other appliances when out of proper condition, or out of their proper place, may suffice, under this doctrine of *res ipsa loquitur* to raise a *prima facie* presumption that the electrical company having such appliances in charge has been neglecting the performance of its duty, and to place upon the company the burden of overthrowing such presumption. The exceedingly dangerous character of electric wires lends force to the strict application of this rule of law to accidents occurring through contact with them under such circumstances, and, unless the rule of *res ipsa loquitur* is applied, it is evident in a large number of cases liability for the resulting injury will be escaped. It is within the power of these companies at all times to show whether they have exercised due care in the erection and subsequent supervision and maintenance of their wires and appliances, while to prove an actionable lack of these things would be in many cases practically beyond the reach of the person injured."

In the case of *Norfolk Ry. & Light Co.* v. *Spratley*, 103 Va. 379, 49 S. E. 502, where plaintiff was injured by coming in contact with an electric wire, this court said:

"This is a clear case for the application of the common-sense rule of evidence expressed in the maxim *res ipsa loquitur*. While electric companies are not held to be in-

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surers against accidents, still it is due to the citizens that such companies, permitted, as they are, to use for their own purposes the streets of a city or town, should be held to the exercise of a high degree of care in the construction and maintenance of the dangerous appliances employed by them to the end that travelers along the highway may not be injured. The danger is great, and care and watchfulness must be commensurate with it. (Citing authorities.) A consequence of this rule as to the high degree of care required in the use of a dangerous current of electricity is the presumption of negligence that is raised by the fact that a dangerous wire has broken and fallen into the street."

"* * * The presumption of negligence arising from an injury to a passer-by in a public street from a broken wire is not overcome so as to require the case to be taken from the jury by the testimony of defendant's employees that the wire was properly constructed and put up."

Likewise, the testimony of the defendant's witnesses in the instant case that they repaired the break in the wire and left it about thirteen feet above the ground does not overcome the presumption of negligence arising from the injury to the plaintiff's intestate, so as to require the case to be taken from the jury.

The general doctrine on the subject of the duties of electrical companies is stated by Joyce on Electric Law, section 445, as follows:

"A company maintaining electrical wires, over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have the right to go either for work, business or pleasure, to prevent injury. It is the duty of the company, under such conditions, to keep the wires perfectly insulated, and it must exercise the utmost care to maintain them in this condition at such places. And the fact that it is very expensive or inconvenient to so insulate them will not excuse

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the company for failure to keep the wires perfectly insulated. So one who, in the course of his employment, is brought in close proximity to electrical wires, is not guilty of contributory negligence by coming in contact therewith, unless done unnecessarily or without proper precautions for his safety. And when the wires, if properly insulated, would not be a source of danger, such person is only obligated to look for patent defects and not for latent defects. And a person who touches an electric wire, from which the insulation is worn off, if he does it in ignorance of the nature and condition of the wire, is not negligent."

The foregoing statement from Joyce is declared by this court, in *Danville* v. *Thornton*, 110 Va. 550, to be a correct statement of the general rule.

To the same effect is *Mitchell* v. *Raleigh Elec. Co.*, 129 N. C. 166; *Thomas* v. *Wheeling E. Co.*, 54 W. Va. 395; *Thormbury* v. *City & E. G. R. Co.*, 65 W. Va. 379; *Clements* v. *Louisiana Elec. Co.*, 44 La. Ann. 692.

Proximate cause does not, as a legal term, necessarily imply closeness or nearness in point of time, or physical sequence of events, but rather closeness or nearness in causal connection. *Watts* v. *Southern Bell Tel. Co.*, 100 Va. 47.

The proximate cause is the superior or controlling agency as contradistinguished from those causes which are merely incidental or subsidiary to such controlling or practical cause. *Snyder* v. *Philadelphia Co.*, 54 W. Va. 149.

The controlling cause of the accident was the negligence of the defendant in leaving unprotected and within five feet of the ground one of its transmission wires carrying 88,000 volts of electricity. This was the cause which *produced the injury*, and without which the injury could not have happened. Certainly it cannot be said, as a matter of law, that the defendant's negligence was not the proximate cause of the injury complained of.

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(b) Was the plaintiff's intestate guilty of contributory negligence?

The plaintiff's intestate was a young man, who had worked only on the farm and at a saw-mill. He knew nothing about electricity in any form. He had seen the defendant's transmission line on the Horn farm and the guy wires used in connection with its poles, but had never seen the wire on which the high voltage was carried in any position except stretched from pole to pole. He had a right to assume that the defendant would not hang its transmission line carrying 88,000 volts of electricity in the pasture field, just a few feet above the ground. He had no cause to suspect that a wire which was tied to a tree, and which Mrs. James thought was a guy wire, was the company's main-line wire, carrying a deadly current of electricity. He certainly did not know that the electricity would jump to him without his touching the wire; but the expert testified that the current of electricity would jump from the wire to an object between it and the ground which came in four and one-quarter inches of it. The evidence is that he was burned from about the center of his forehead down over his body, and the burn on the forehead was "not specially deep." Had his forehead touched the wire, the burn on it would doubtless have been very deep and severe. The conclusion is irresistible that his forehead came within four and one-quarter inches of the wire and the current jumped to him and passed through his body to the ground.

Just how the accident occurred the record does not disclose. Whether the plaintiff's intestate stumbled or became suddenly dizzy and fell forward near the wire, or stooped to pick up some object near the wire, or to go under it, we do not know. Had he desired to go under the wire, the presumption is he would have gone to it at a point where he could have passed under it without having to bend his body.

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Mrs. Clara James, the only person present, testified that she had her back to young Hale and heard an awful loud noise and looked around and he was falling back away from the wire; that he was close to it, but she did not know whether or not he was right up at it. She says she saw some smoke and a blue blaze, and sparks and balls of fire.

The law required the plaintiff's intestate to use ordinary care for his own protection against injury; but negligence is not imputable to a person for failing to look for danger when, under the surrounding circumstances, he had no reason to apprehend any. And where a defect or danger is unknown to the person injured, he is not negligent as a matter of law in failing to avoid it.

In *Telephone Co.* v. *Ellis* (Ga.), 87 S. E. 768, the court said: "It was an issue of fact whether the plaintiff's husband knew the dangerous condition of the defendant's wires, and could have avoided injury to himself by the exercise of ordinary care. The trial judge accurately and fairly submitted this issue to the jury. The right of plaintiff to recover was to be tested by the conduct of her husband at the time of his alleged homicide, keeping in view his knowledge, or lack of knowledge, of the condition of the wires."

In 20 Ruling Case Law, pages 107-8, the law of contributory negligence is stated thus: "The true foundation of liability is knowledge, or what is deemed in law to be the same thing, opportunity by the exercise of reasonable diligence to acquire knowledge, of the peril which subsequently results in injury. Or, as it is generally expressed, a plaintiff will not be held to have been guilty of contributory negligence if it appears that he had no knowledge of the danger, and conversely he will be deemed to have been guilty if shown that he knew of the peril, and might have avoided it by the exercise of ordinary care. This element of knowledge, it should be noted, is the foundation of the maxim, *volenti non fit injuria.*"

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In the case of *Electric Co.* v. *Nugent's Adm'r* (N. J.), 32 L. R. A. 700, where a policeman was found dead at the foot of an electric pole on which was an exposed electric wire, and death was shown to have been due to electric shock, the court said: "Nor is the objection that the deceased's own carelessness contributed to the injury which caused his death more tenable. There was nothing in the plaintiff's case to show under what circumstances he received the shock which killed him, and nothing, therefore, upon which his negligence can be predicated. It did not appear that he had knowledge that the wire was not properly insulated, or that it was charged with electricity, and he, as well as every member of the public, was justified in presuming that this company had so constructed its electric light line and was so maintaining it that it would not be a source of danger to persons using the streets."

In *City of Richmond* v. *Gray's Adm'r*, 103 Va. 320, 49 S. E. 482, this court held that whether the decedent was guilty of contributory negligence was a question for the jury.

From what has been said, it follows that the contributory negligence of the plaintiff's intestate, like the defendant's negligence and the proximate cause of the injury, was a question for the jury, and there being some conflict in the evidence their verdict is controlling. There was ample evidence to support the verdict, and, under settled principles, we cannot disturb it.

The demurrer was properly overruled.

A careful consideration of the arguments in the brief, upon the assignment of error relating to instructions, convinces us that the instructions as a whole fairly and fully submitted the case to the jury and that there is no error therein of which the defendant can complain.

Upon the whole record, we find no reversible error in the judgment complained of, and it will be affirmed.

Affirmed.

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BIG SANDY AND CUMBERLAND RAILROAD COMPANY *v.* BALL.

(*Staunton, September 21, 1922.*)

1. PLEADING AND PRACTICE.—Continuance—Evidence.
2. CARRIERS.—Loss of Shipment—Designation of Connecting Carrier—Bill of Lading—Instructions—Notice of Claim—Grounds of Defense—Code, sec. 6091—Burden of Proof—Code, sec. 3926—Erroneous Instruction Given at Instance of Complaining Party.

Error to Circuit Court of Buchanan county.

Affirmed.

Greever, Gillespie & Divine and *Williams & Combs,* for the plaintiff in error.

S. H. & Geo. C. Sutherland, for the defendant in error.

BURKS, J.:

This was an action of trespass on the case in which Ball, the defendant in error, recovered against the plaintiff in error a judgment for $480 for loss of a barrel of furs. The evidence in the case is brief and is as follows:

"G. W. Ball, the plaintiff, who stated that he shipped the barrel of fur by freight from Grundy, Va., on February 15, 1918, consigned to himself at Raven, Va., as shown by bill of lading introduced in the case, and that said shipment went by freight over the defendant company's railroad to its terminus at Devon, in the State of West Virginia, and that he instructed said defendant company to send said barrel of fur from its terminus at Devon, W. Va., by express to him at Raven, Va., over the Norfolk and Western Railroad, which is the only railroad which runs from Devon to Raven; that he had made several other shipments the same way over the same route.

"The plaintiff introduced in evidence by this witness the original bill of lading, given him by the defendant company, which is as follows:

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* * * *

"The witness stated that he had paid $379.75 for said barrel of fur, but that it was worth $480.00.

"This plaintiff also stated that he had called for said barrel of fur at different times at the point of destination at Raven, Va., and that he had called for it and made claim within ten days of the date of shipment, but that it had not been delivered.

"After witness had left the witness stand, in response to a question as to whether written notice was given of the loss of the barrel of fur, he replied that he had by written letter notified the defendant company at its general office of his loss, at Columbus, Ohio. The witness had left the witness chair when the last question was propounded, but was in the bar in the presence of the court and jury.

"And the defendant, to prove and maintain the issue on its part, offered the following evidence, to-wit:

"The way-bill showing the shipment by freight from Grundy, Va., to Devon, W. Va., of the barrel of fur weighing 100 pounds at the rate of seventy cents; and also a copy of bill showing a delivery of said shipment on February 16, 1918, to the Southern Express Company by the defendant company at Devon, W. Va., operating over the Norfolk and Western Railroad."

The bill of lading referred to by the plaintiff in his testimony shows the receipt by the railroad company of one barrel of furs of G. W. Ball, at Grundy, Va., consigned to G. W. Ball, at Raven, Va., "route express from Devon, W. Va.," to be carried "to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination." The bill of lading was subject to the conditions printed thereon, amongst which was, "except in cases where the loss, damage or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, claims must be made in writing to the car-

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rier at the point of delivery, or at the point of origin within four months, after a reasonable time for delivery has elapsed." When the case was called for trial, the defendant railroad company moved for a continuance on the ground that its attorney, who lived in another county, "and the only attorney who had had charge of this case for the defendant since it was instituted until the present term when Williams and Combs appeared, had been unexpectedly called away about the beginning of this term of court, but some days before the calling of this case, on account of the sudden illness of his wife's uncle, who lives in Smyth county, Va., and his files contained the correspondence concerning this case, with the general office of the defendant company at Columbus, Ohio, including some records and documents that were necessary for the defendant to have and introduce in evidence in this case, and that the defendant could not go to trial without these records and documents. Plaintiff objected to a continuance, and asked a trial because Mr. Greever was absent at a previous term of court, and the case was continued on account of his absence." But the court overruled the motion and forced the defendant into trial. The defendant pleaded the general issue, "not guilty," and the plaintiff asked that defendant be required to state the grounds of its defense, and the court so ordered, but no ground was ever stated.

1.

The first ground of error assigned is the refusal of the trial court to grant the defendant's motion for a continuance. No evidence was offered to sustain the motion, and it does not appear in any way how, if at all, the defendant was prejudiced by the ruling of the court. It appears to have been represented at the trial by able counsel, who presented its defense fully, and the testimony fails to disclose the existence of any "records and documents" not available to such counsel. The trial court committed no error dis-

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closed by the record in refusing the continuance. As said in *Va. Iron, Coal & Coke Co.* v. *Kiser,* 105 Va. 695:

It has been often repeated by this court and is the established rule everywhere that the granting and refusing of a continuance is always addressed to the sound discretion of the trial court, and to entitle a party to a reversal on that ground it must be clearly shown that the court abused its discretion, and that injury resulted to the party complaining from the abuse.

"The defendant company has not pointed out in its petition for this writ of error, nor is there disclosed in the record, any mismanagement or mistake by the learned counsel who conducted the trial for the defense in the court below, or any injury that resulted to it by reason of the absence of Mr. Cabell; therefore, there is no ground whatever upon which to rest this assignment of error." See also *Thompson's Case,* 131 Va. 847, 24 Va. App. 642.

The next error assigned is the refusal of the trial court to give defendant's instructions numbered 1 and 2. Both of these instructions are founded upon the theory that, because the plaintiff had designated the connecting carrier, to-wit, by express from Devon, W. Va., to Raven, Va., there was no through bill of lading, and that when the railroad company delivered the furs to the express company at Devon, it had fulfilled its obligation; that the bill of lading was only evidence of a contract to carry from Grundy, Va., to Devon, W. Va., and that after reaching the latter point it was acting as agent for the shipper in making the delivery to the express company. The bill of lading, on its face, shows that it is a through bill, giving the point of receipt as Grundy, Va., and the point of destination as Raven, Va. That the designation of the connecting carrier, under facts similar to those here existing, does not affect the character of the bill of lading as a through bill was distinctly held in *Norfolk & W. Ry. Co.* v. *Dixie Tobacco Co.,* 228 U. S. 593, 33 Sup. Ct. 609. There was no

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error, therefore, in refusing the defendant's instructions 1 and 2.

The giving of the plaintiff's instruction No. 4 is assigned as error. That instruction was as follows:

"The court instructs the jury that if they believe from the evidence in this case, by a preponderance thereof, the defendant at Grundy, Va., received the goods described in the declaration in this case, and accepted the same for transportation and delivery as a common carrier to be delivered to the plaintiff at Raven, Va., and that the defendant was notified of the nondelivery thereof, by the plaintiff, and made claim therefor, within four months' time after nondelivery thereof, then you will find for the plaintiff, and assess his damages at the value of the goods so delivered to it at the time of the delivery of the same, together with interest on said amount from the date of delivery to it."

The objection to this instruction is that it did not inform the jury that the "claim must be made *in writing* to the carrier at the point of delivery, or at the point of origin within four months," as required by the bill of lading; that this was a condition precedent to the right of the plaintiff to recover.

The action was in tort, trespass on the case, and the general issue was "not guilty," under which the defendant is "not at all confined to a denial of the case made by the plaintiff's declaration, and a defendant is permitted not only to test the truth of the declaration, but (with a few exceptions, such as the act of limitations and one or two others) to prove any matter of defense that tends to show that the plaintiff has no right of action, though such matter be in avoidance of the declaration, as, for example, a release given, or satisfaction made." Burks Pl. & Pr. (2d ed.), sec. 125, p. 194.

In order to meet cases of this kind, and to give the plaintiff more definite information of what defenses the defend-

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ant intends to rely on, section 6091 of the Code was enacted, declaring:

"In any action or motion, the court may order a statement to be filed of the particulars of the claim or of the ground of defense; and if the party fail to comply with such order, may, when the case is tried or heard, exclude evidence of any matter not described in the notice, declaration or other pleading of such party so plainly as to give the adverse party notice of its character."

In Burks' Pl. & Pr. (2d ed.), sec. 305, it is said: "If a defendant pleads the general issue, but fails or refuses to state his grounds of defense, when called for, he may, nevertheless, offer evidence to disprove the case sought to be proved by the plaintiff. Section 6091 of the Code was not intended to deprive the defendant of this right. His evidence, however, will be restricted to the point covered by his bill, to-wit: A denial of what the plaintiff would be obliged to prove in order to maintain his action, and does not extend to matters of confession and avoidance."

No bill of particulars was filed in the case at bar, giving the plaintiff the grounds of the defense to which he was entitled. When the plaintiff proved a delivery of the furs to the defendant to be carried as aforesaid, an acceptance of such delivery and a failure to deliver in a reasonable time, he made out a *prima facie* case. This is expressly so provided as to intrastate shipments by section 3926 of the Code, and the same principle applies to an interstate shipment where there is a failure to file a bill of particulars when so required. The burden was then cast upon the defendant to relieve itself of liability. This it could only do by matter in confession and avoidance which was not admissible in the absence of a bill of particulars. Had a bill of particulars been filed, claiming the insufficiency of the notice of loss of the furs, the plaintiff might have been able to show that the claim made by him "within ten days of the date of shipment" was accepted by the defendant as

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a compliance with the bill of lading, or that formal notice in writing was waived, or some other matter relieving the plaintiff from compliance with the bill of lading. The defendant could not, by refusing to file a bill of particulars, deprive the plaintiff of the information to which the statute entitled him, nor could it lull him into security by apparently relying upon a different defense and, after the evidence was closed, rely upon the ground of the insufficiency of the notice of loss. Under the pleadings in this case, the letter written by the plaintiff to the defendant at its general office, at Columbus, Ohio, will be deemed to be a sufficient notice under the bill of lading, and a failure to file a bill of particulars, as a waiver of any other notice. On this point we rest our conclusion on section 6091 of the Code and the construction heretofore placed thereon, and express no opinion as to the burden of proof of such notice required by the bill of lading, or whether the proof of such notice is a condition precedent to the plaintiff's right of recovery, or is a matter of defense under a different state of the pleadings, as to which the decisions are not in harmony. See notes 9 Ann. Cas. 15, 14 Ann. Cas. 416.

The trial court, therefore, committed no error in giving instruction No. 4.

Objection is also made on the ground that instruction 4, given for the plaintiff, is in conflict with instruction 3 given for the defendant. Instruction 3 was as follows:

"The court instructs the jury that unless they believe from the evidence that the plaintiff, G. W. Ball, did, within four months after the lapse of a reasonable time for the delivery of the goods in question, make claim for his alleged damages and deliver such claim, in writing, to the agent of the defendant railroad company at Grundy, Va., or to the agent of the carrier at the point of delivery, they shall find for the defendant company."

Instruction 3, given for the defendant, did not correctly state the law arising upon the pleadings and the evidence,

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and should not have been given. It placed upon the plaintiff the burden of repelling a defense that the defendant had no right under the pleadings to make. The duty to give written notice of the claim was not set up as a matter of defense by any pleading filed in the cause, and was not in issue, and the defendant had no right to call for an instruction on the subject. The giving of instruction 3 was an error into which the railroad company led the trial court, and of which it cannot now complain. A verdict which is correct will not be set aside simply because it is in conflict with an erroneous instruction given at the instance of the party complaining. Burk's Pl. & Pr. (2d ed.), pp. 504, 585, and cases cited; *Queen Ins., Co.* v. *Perkins*, 129 Va. 216, 222.

We find no error in the judgment of the circuit court.

Kelly, P., concurs in result.

Affirmed.

BOURNE v. RICHARDSON.

(*Staunton, September 21, 1922.*)

1. POLICE OFFICERS.—Right to Arrest Without Warrant—Belief of Guilt of Felony—Second Violation of Prohibition Law—Evidence—Damages for Malicious Shooting—Resisting Arrest—Instructions—Admission of Evidence—Explanation by Plaintiff of Plea of Guilty—Harmless Error—General Objection to Evidence—Proof of Animus—Direction to Strike Out Evidence—Instructions—Arrest by "Authority of Law"—Burden of Proof—Right of Person Arrested to be Informed of Nature of Accusation—Demand—Punitive Damages—Burden of Proof.

Error to Circuit Court of Montgomery county.

Affirmed.

Jackson & Henson and *H. C. Tyler*, for the plaintiff in error.

Jordan, Roop & Sowder, John S. Draper and *Harless & Colhoun*, for the defendant in error.

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KELLY, P.:

This is a proceeding by motion instituted by John W. Richardson against C. H. Bourne to recover damages for the alleged unlawful and malicious shooting of Richardson by Bourne. There was a verdict and judgment below for $3,000 in favor of the plaintiff, and the defendant assigns error.

The evidence was conflicting upon some material points, but as tending to support the verdict it may be fairly summarized as follows:

Bourne was a police officer in the city of Radford. Richardson was well known in that city, and bore the general reputation of being a "bootlegger." On two separate occasions he had pleaded guilty to a charge of violating the State prohibition law, and had accordingly been convicted, once in the Circuit Court of Pulaski county and once in the Corporation Court of the city of Radford. At the time of this shooting, a warrant for his arrest for another violation of the prohibition law had been issued, but not executed. This warrant, which made no reference to the prior convictions and charged merely a misdemeanor, was in the hands of another officer. Bourne knew of the foregoing facts, but had never seen the warrant and did not know its precise purport. He testified that he had been advised by the Commonwealth's attorney of the city that because of the former convictions he could lawfully arrest Richardson without a warrant. The attorney for the Commonwealth testified as a witness, having been placed on the stand by the defendant, but he was not asked any question by either side as to this alleged advice, and he made no statement in regard thereto.

The shooting occurred about eight o'clock in the evening. Richardson was on the street, violating no law and creating no disturbance. His testimony as to the circumstances under which the shooting occurred is very summed up in one of his answers as follows: "I was going down the

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street, met Mr. Bourne; we happened to meet up together. 'Mr. Richardson,' he says, 'I will have to arrest you.' I says, 'You are fooling, ain't you, Pat.' He says, 'No, I am not fooling.' I says, 'Where's your warrant?' He says, 'I don't have to have any.' I says, 'What's the charges?' He says, 'Don't have to have any.' At this time Bourne grabbed me right there, and drew the pistol with the other hand. I says, 'You got no warrant, I am not going with you,' and pushed off from him, and got away from him. Then he shot four or five shots at me, and the last shot he shot me; and I was in twenty feet, maybe a little more or a little less, the first shot that he shot at me."

Other witnesses for the plaintiff testified substantially to the same effect, one of them saying that Bourne took hold of the flap of Richardson's coat at the time of announcing his intention to make the arrest. The account of the shooting, as given by the defendant Bourne is altogether at variance and wholly irreconcilable in almost all respects with the account given by Richardson, but the apparent weight of the testimony is with the version given by Richardson, and the jury so found.

The shot which struck Richardson took effect in his right arm, causing painful and serious, and probably permanent injury. He sought medical treatment at a local hospital, and the physician there, after failing to locate the bullet, administered antiseptic treatment, dressed the wound, and advised him to go immediately to a hospital in Roanoke, where he could have an X-ray examination and expert treatment by a surgeon. Richardson did go to Roanoke on a train leaving shortly after the shooting, arriving there between eleven and twelve o'clock at night, but he was met at the station and arrested by Roanoke officers, to whom Bourne had telephoned in accordance with advice which he testified was given to him by the Commonwealth's attorney. No question was asked of the attorney for the Commonwealth upon this point when he was on the stand,

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and he made no statement with regard thereto. The Roanoke officers would not permit Richardson to give bail and go to the hospital, but placed him in jail, where he remained until the next afternoon, when the sergeant of the city of Radford came and took him back to that city. He was then allowed bail, and after treatment by local physicians for some weeks, went back to Roanoke, where Dr. Trout made an X-ray examination and removed the bullet.

We come now to the assignments of error.

1. The chief ground relied upon by the defendant to justify him in arresting the plaintiff without a warrant was that the latter had formerly been convicted of violating the prohibition law, and that the defendant, having reasonable grounds for believing, and in good faith believing, that the plaintiff had committed a second similar offense, had the right to arrest him without a warrant on the theory that he was guilty of a felony.

In support of this position the defendant, during the cross-examination of the plaintiff, introduced in evidence an order of the Corporation Court of the city of Radford, dated November 10, 1919, showing that, upon a plea of guilty, a certain John W. Richardson had been convicted in that court on a charge of violating the prohibition law, and then asked the plaintiff whether he was the same John W. Richardson named in that order of conviction. The plaintiff admitted that he was the same man, and his counsel asked him to explain to the jury why he entered the plea of guilty. To this question, counsel for defendant objected, but the court permitted the plaintiff to answer, and the substantial purport of his reply was that he was, in fact, not guilty and had so pleaded on his first trial when there was a hung jury, but subsequently, merely as a matter of economy, he pleaded guilty, finding that by doing so and paying a fine of $50.00, he could save an attorney's fee of $150, which his counsel would charge him for defending

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the case. (The order of conviction shows that the jail sentence was suspended during good behavior.)

It is insisted that the court erred in permitting this explanation by the plaintiff, and in this view we concur. The judgment of conviction was conclusive for the purposes for which the defendant offered it in evidence. But this error, in our opinion, cannot be regarded as prejudicial, because the jury clearly was not influenced by it. It did not enter into the decisive issue upon which the verdict necessarily turned, as will now appear.

The outstanding difficulty in the way of the defendant in this case was the fact that he was not armed with a warrant. His defense was that he attempted to arrest the plaintiff because he was drunk and disorderly, and also because he knew of his former convictions, and of the unexecuted warrant against him for a further violation of the prohibition law, and, therefore, believed in good faith that he was guilty of a felony. If the jury believed that either or both of these reasons actuated the defendant in making the arrest, he would have been justified in proceeding without a warrant, but they evidently believed neither. The alleged intoxication of the plaintiff depended for its proof on the testimony of the defendant alone, and was contradicted by much evidence to the contrary. This branch of his case was very lightly touched upon at the trial, and none of the seven instructions asked for and given on his behalf placed any particular emphasis thereon. The defense really relied upon was, as above indicated, that the defendant knew of the plaintiff's former conviction and of his subsequent alleged violation of the law, and, therefore, believed, in good faith, that the plaintiff was a felon, and was making the arrest for that reason. The instructions of the court specifically and emphatically told the jury that if this contention was true, no warrant was necessary. The jury evidently did not believe that he was telling the truth when he testified that he was in good faith trying to arrest

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the plaintiff as a felon, but their failure to believe this was manifestly in no way brought about by the erroneous evidence here in question. At the time of the arrest, the defendant's knowledge of the previous convictions was unaffected by any attempted explanation by Richardson as to why he had pleaded guilty, and it would hardly be reasonable to suppose that the jury attached any importance to this subsequent explanation in determining the question of Bourne's good faith in acting at the time of such knowledge as he then possessed. It is perfectly clear that the jury simply rejected his contention that he was arresting the plaintiff as a felon, and they undoubtedly did this because the evidence tended strongly to show that when the plaintiff was tried and acquitted shortly after the shooting upon a charge of resisting arrest, the defendant then claimed that he was arresting him for drunkenness, and made no reference to any felony charge. Jurors are presumed to be men of sense and integrity, and as such they could not, under the plain instructions of the court in this case, have found against the defendant upon the question of his *right* to arrest for the felony without a warrant if they believed his testimony. Upon this question, the subsequent inadmissible explanation of the plaintiff as to his former conviction could have had no effect. What the jury could and did do under the evidence and instructions, unaffected by the subsequent explanation, was to find that Bourne was not telling the truth when he said that he was, in good faith, proceeding to arrest Richardson for a felony. To make this clear, we set out here the instructions raising this issue before the jury and presenting to them the respective theories of the parties:

Plaintiff's Instruction No. 8.—"The court instructs the jury that an officer of the law has no right to arrest any one without a warrant, unless they are committing some offense in his presence, violating either a State or city law; or unless the officer, in good faith, believes the party has

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committed a felony, and is arresting him for the commission of the felony; and if the jury believes that the plaintiff, John W. Richardson, at the time he was attempted to be arrested, was committing no offense in the presence of the officer, and if the jury believes that at the time C. H. Bourne attempted to arrest the said John W. Richardson, that he, the said C. H. Bourne, was not arresting him on any felony charge and did not have such a charge in mind, then the court instructs the jury that the said C. H. Bourne had no right to arrest the said Richardson, and the said Richardson had the right to resist the arrest or flee to prevent the same, and if the jury believes that the said C. H. Bourne shot the said Richardson without any authority as defined in these instructions to arrest him, then he is liable in damages to the said John W. Richardson."

Defendant's Instruction No. 2.—"The court instructs the jury that a police officer has the right to arrest, and it is his duty, under the law, to arrest, without a warrant, any person who he has reasonable or probable cause to believe has committed a felony. And, if the jury shall believe from the evidence in this case that the plaintiff, Richardson, had been convicted of violating the prohibition law, and the defendant, Bourne, knew, or had been informed of that fact, and the jury shall further believe from the evidence that the defendant, Bourne, at and prior to the time he attempted to make the arrest complained of, believed and had reasonable or probable cause to believe that plaintiff had been guilty of a second violation of the prohibition law by unlawfully selling liquor and was guilty of a felony, and that he was arresting him for the felony, among other causes, then they are told that the defendant had the right to arrest plaintiff without a warrant."

The verdict shows that, both as to any offense committed in defendant's presence and as to the suggested felony, the jury accepted the plaintiff's theory and version, and rejected the theory and version of the defendant, and there

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is no just reason to suppose that in doing this they were in any way influenced by the evidence in question. It is difficult to read the record without being satisfied that the defendant's present contention that he was arresting the plaintiff upon a felony charge was an afterthought and a pretext resorted to after he became satisfied that he could not safely rely upon his first position (that he was arresting the plaintiff for being drunk and disorderly in his presence), and this undoubtedly is the view which the jury took of the case.

Upon these considerations, we feel constrained to hold that, while the court erred in admitting the testimony, the error must be regarded as harmless.

It may be said before leaving this point that as to the order of conviction in the Pulaski Circuit Court, the plaintiff had previously, on cross-examination, made substantially the same explanation of his plea of guilty as in the Radford order, and did this, if not at the instance at least with the acquiescence, of the defendant. It is insisted that, having previously invited this error in connection with the order in the *Pulaski Case*, the defendant waived or rendered it harmless in regard to the *Radford Case*, in accordance with the holding of this court in such cases as *Southern Ry. Co.* v. *Blanford*, 105 Va. 373, 387, and *Mohler* v. *Commonwealth*, 132 Va. 713, 25 Va. App. 384, 392. It is unnecessary, for reasons already appearing, for us to decide whether the principle of waiver here invoked applies in this connection.

2. The plaintiff testified that on his arrival at Roanoke he was arrested by officers who said they had received orders by telephone from Radford officers to hold him for further orders; that they took him to jail, denied him bail, and would not permit him to go to the hospital. The court overruled an objection to this evidence, and the defendant excepted. The complaint against this evidence stressed in the assignment of error is that it permitted the jury to

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consider the action of the Roanoke officers in refusing bail and denying the plaintiff the right to go to the hospital. As shown by the bills of exception, however, the objection was entirely general, specifying no grounds, designating no particular portion of the evidence in question, and suggesting no restrictions upon its effect. If, therefore, we shall find that any part of it was admissible for any purpose, a general objection to the whole was not good, and the exception to the action of the court must be overruled. *Sulphur Mine Co.* v. *Thompson*, 93 Va. 293, 307; *Hardy's Case*, 110 Va. 910, 922, 4 Va. App. 161; *Washington, etc., Ry. Co.* v. *Trimyer*, 110 Va. 856, 860, 4 Va. App. 80; *Lynchburg Cotton Mills* v. *Rives*, 112 Va. 137, 140, 5 Va. App. 29. What the officers said to the plaintiff about the source of their orders was hearsay as an original proposition, but the plaintiff was relieved from proving that the defendant did, as a fact, telephone the Roanoke officers to arrest and detain him by the admission of that fact in the testimony of the defendant. The plaintiff's notice of motion alleged that the defendant had unlawfully and maliciously shot him, and there was abundant evidence tending to support that allegation. This being true, it was proper, as bearing upon the question of animus, to allow proof that the defendant further pursued the plaintiff and caused his arrest. The arrest and detention in Roanoke was certainly a proximate result of the telephone message, and to that extent the evidence was clearly free from objection. The point that the action of the Roanoke officers, with reference to bail and the denial of the request of the plaintiff to be allowed to go to the hospital, should not have gone to the jury, conceding that it was good, was not made in the court below, and under the authorities above cited cannot be availed of now.

3. During the cross-examination of the defendant, counsel for the plaintiff elicited from him the fact that some years prior to the trial he had been removed from the police

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force of the city of Radford by the mayor, and the line of cross-examination being pursued by counsel indicated a purpose to show that the removal had been on account of indiscretion and rashness. This testimony was objected to, but the objection was overruled. Later on during the trial, the defendant by counsel moved to strike out all such evidence, and the motion was overruled. Still later, but some time before the conclusion of the evidence, the court reconsidered these rulings and struck out all of the evidence of the character here under consideration.

It is insisted that the evidence with respect to the removal of the defendant from the police force was not only wholly irrelevant, but was of such a damaging character as that the action of the court in striking it out did not cure the error in its admission. We cannot accede to this view of the question. As was said in the case of *Wash. & O. D. R. Co.* v. *Ward*, 119 Va. 334, 339, 12 Va. App. 203: "There are cases in which the error of admitting improper testimony, or the effect of mere statements of counsel, cannot be adequately overcome by a subsequent direction to the jury to disregard the objectionable evidence or statements. Such cases, however, are exceptions, and we do not think this is one of them. In the multitude of questions arising in jury trials, and in the zeal and earnestness of counsel, however well intended, it is practically impossible for the court to keep the case on trial at all times entirely free from minor irregularities and mistakes; and the course taken by the trial judge in the present instance is in accord with a common and widely approved practice. A judgment ought not to be reversed for the admission of evidence or for a statement of counsel which the court afterwards directs the jury to disregard unless there is a manifest probability that the evidence or statement has been prejudicial to the adverse party. A different rule would result in fixing an intolerable handicap upon the *nisi prius* courts." See also *N. & W. Ry. Co.* v. *Steele*, 117 Va. 788,

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10 Va. App. 628; *Taylor* v. *Commonwealth*, 122 Va. 894, 15 Va. App. 371.

It is said in the petition for writ of error that after the court had ruled upon the question and had stricken out the former evidence on the subject, counsel for plaintiff, to further prejudice defendant's case before the jury, thereupon stated, in open court in the presence of the jury, as follows: 'I expect to prove on charges preferred by him (mayor of Radford) against Mr. Bourne as being generally incompetent as a police officer, unfit to be an officer and wanting in discretion; that he, the mayor, had him removed from office.' "

In the brief of counsel for the plaintiff it is denied that this avowal was made in the presence of the jury, the contention being that it was dictated to the stenographer reporting the case merely for the purpose of preserving the exception in the record to the ruling of the court. However this may be, if it be conceded that the point would be material, we, of course, cannot undertake to settle this difference between counsel, and the bill of exceptions on the subject contains no reference whatever to the avowal. If counsel intended to make a point of this incident, exception should have been taken at the time, and the facts in regard thereto should have been preserved in the record by a certificate of the trial judge.

4. The next assignment to be considered involves the instructions to the jury.

(a) Instruction No. 1, given for the plaintiff, was as follows: "The court instructs the jury that the burden is on the defendant to show by a preponderance of the evidence that the arrest was by authority of law."

It is said that this instruction ought to have told the jury definitely what was meant by "authority of law." The instruction, however, was dealing merely with the question of burden of proof, and stated the rule in regard thereto correctly. As applied to this case, instruction No. 8 for the

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plaintiff and instruction No. 2 for the defendant, quoted above in full, informed the jury in an intelligent and practical way what constituted authority of law for the arrest of the plaintiff by the defendant. The case of *Muscoe* v. *Commonwealth*, 86 Va. 448, is cited, but is not in point as supporting this assignment of error. In that case, the instruction condemned told the jury that they must decide from the evidence whether the arrest was unlawful or not, and left them without any satisfactory guide. As said by Judge Lewis in that case: "The court ought, therefore, to have explained to the jury what constitutes a legal arrest, and then have left it to them to say whether, upon the evidence before them, the arrest in question was legal or not. As it was, they were left without any positive rule to guide them to a correct conclusion." In the instant case the two instructions to which we have referred met this difficulty.

(b) Instruction No. 3, given for the plaintiff, was as follows: "The court instructs the jury that it is the legal duty of an officer in making an arrest of an alleged offender, after he peaceably submits, to acquaint the party he proposes to arrest with the nature and character of the accusation of the alleged crime for which he is going to arrest him, unless the offense be committed in the presence of the officer, and, unless the jury shall believe from the evidence that such crime was committed in the presence of the officer when he attempted to make the arrest, or that said officer apprised the plaintiff of a felony charge against him, then, in such circumstances, the said plaintiff had the right to use such reasonable force as was necessary to prevent the arrest, and the officer had no right to shoot the plaintiff to prevent his escape."

It is urged as the first objection to this instruction that there was no evidence to show that the plaintiff peaceably submitted to arrest. We do not think this position, upon a fair view of the evidence from the plaintiff's standpoint, can be sustained. It is true that the plaintiff was not ef-

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fectually and permanently detained by the officer, and in that sense the arrest was not completed, but this would be true in any case where an officer orders an alleged offender to submit to arrest and the latter, without resistance or refusal to submit, asks for and is denied information as to the charge, and then resists and makes his escape. This is just what happened in this case if the evidence for the plaintiff is credited, because that evidence shows that, after defendant had laid hold on the plaintiff's coat and said, "I will have to arrest you," the latter made no effort to resist or escape until after he had peaceably asked about the warrant and the nature of the charges, and the defendant had shortly and rudely answered that he did not have to have any warrant or specify any charge.

If the testimony of the plaintiff is true, and the jury evidently believed it was, the plaintiff did peaceably submit to the officer's authority, and without show of resistance or refusal to accompany him, afforded the latter an opportunity to acquaint the plaintiff with the nature of the charges. Having been pointedly refused the information to which he had thus entitled himself, he had the right to make reasonable resistance. These conclusions are not in conflict with, but indeed necessarily follow from, the authorities cited on this point by counsel for the defendant, which are as follows: *Richardson* v. *Burger* (Ala.), 17 Ann. Cas. 898, 5 C. J. 392; *Idem* 420, note bottom right-hand page; *Commonwealth* v. *Cooley,* 6 Gray (Mass.) 350; *U. S.* v. *Rice,* 27 Fed. 153.

The second objection urged against the instruction is that "it makes it the absolute duty of a known officer making the arrest to acquaint the accused party with the nature and character of the accusation of the alleged crime for which he is going to arrest him, whether such party requests such information or not."

Strictly speaking, the instruction should have conditioned the right of the plaintiff to be informed of the felony charge

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upon a demand by him for the nature of the accusation. This defect in the instruction, however, was not harmful to the defendant in this case for two reasons. In the first place, the respective accounts of the circumstances surrounding the arrest given by the plaintiff and the defendant are, as already pointed out, so wholly at variance that it was impossible for the jury to reconcile them, and they manifestly accepted as true the plaintiff's version, and rejected the version of the defendant. This being true, the case must be considered as if the plaintiff did demand and was refused the information, and the omission to refer to that fact in the instruction is immaterial. All instructions must be read in the light of the evidence, and if, when so read, they are not misleading, technical errors as to abstract propositions are not regarded as prejudicial. As was said by this court in *Va. Ry. & P. Co.* v. *Smith & Hicks,* 129 Va. 269, 275, 22 Va. App. 220: "The sufficiency and correctness of an instruction depend largely upon the facts and nature of the case in which it is given."

A further reason why this second objection urged against instruction No. 3 is not good is that instruction No. 6, given for the defendant, not in any substantial conflict with the former, removed any such difficulty as the objection suggests. Defendant's instruction No. 6 was as follows:

"The court instructs the jury that if they believe from the evidence that the defendant had the right to arrest the plaintiff, then it was the duty of the plaintiff to quietly submit to arrest before demanding the cause, and if the jury shall believe from the evidence that upon the defendant attempting to arrest the plaintiff, and before the plaintiff submitted to arrest, the latter demanded the cause of the arrest, and refused to consider himself under arrest, then they are told that the defendant in no wise forfeited his right to the protection of the law by failing to notify the plaintiff of the cause of his arrest, if they believe from the evidence that he demanded the cause."

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With this and other instructions before them, the jury must have believed from the evidence that the plaintiff did quietly submit to the officer before demanding the cause of his arrest, and that he then demanded the cause thereof before making any resistance. Unless they did so believe, they could not have found for the plaintiff without violating the perfectly plain instructions of the court, and this they are presumed not to have done.

(c) The plaintiff's instruction No. 6 told the jury that "if they believed he was permanently injured, and if they further believe that the wound was unlawfully or maliciously inflicted, that they may add to their verdict such exemplary damages as they may deem reasonable by way of punishment to the defendant for the malicious and unlawful act." Complaint is made of this instruction because it tells the jury that they may add exemplary damages if they should find that the assault was unlawful *or* malicious, whereas if it were merely unlawful and not malicious, no such damages could be properly annexed. In view of the seriousness of the injury as shown by the evidence, it does not seem very probable that much, if anything, was added to the verdict as punitive damages. Still, we cannot say that this instruction did not in some degree affect the result, and if the expression "unlawful or malicious" stood alone and unexplained, the objection might be serious. We are of opinion, however, that when the entire language of the instruction is construed as a whole, the jury could hardly have been misled to the prejudice of the defendant because that portion of the instruction which says that the jury "may add to their verdict such exemplary damages as they may deem reasonable by way of punishment to the defendant *for the malicious and unlawful act*" seems to be sufficient to convey the idea that the act must be both malicious and unlawful in order to warrant the finding of such damages. The principle applied by this court in the case of *Benn* v. *Hatch*, 81 Va. 25, 35, seems to us to apply here.

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In that case, the court said: "In every case where objection is made to an instruction of the lower court, the first point of inquiry is, whether the jury were misled; and this can be determined only by an inspection of the instruction as a whole taken in connection with the pleadings and the evidence, and if, when so construed, it appears probable that the jury were not misled, the judgment will not be reversed, although the instruction, in some of its parts, may not be strictly correct." See also to the same effect *Dungee* v. *Unrue*, 98 Va. 252; *Bolton* v. *Vellines*, 94 Va. 404.

(d) The plaintiff's instruction No. 7, given over the objection of the defendant, was as follows:

"The court instructs the jury that, while the burden of proof is on the plaintiff to make out his case by a preponderance of the evidence, yet when he has so made out his case, that then the burden rests upon the defendant to sustain his allegation of a justifiable shooting; and if the jury shall believe from a preponderance of the evidence that C. H. Bourne shot John Richardson without a legal excuse therefor, that you should find a verdict in favor of the plaintiff in such sum as the evidence shows the said Richardson has sustained damages, but not to exceed the sum of ten thousand dollars."

We find no error in this instruction. Its first proposition, that "the burden of proof was on the plaintiff to make out his case by a preponderance of the evidence," is plainly correct and is favorable to the defendant; and this proposition is emphasized by a subsequent expression which makes the plaintiff's recovery dependent upon the jury's belief "from a preponderance of the evidence that C. H. Bourne shot John Richardson without legal excuse therefor." The part of the instruction complained of is that "the burden rests upon the defendant to sustain his allegations of a justifiable shooting."

If we correctly apprehend the contention of counsel for defendant, in their argument against the instruction, it is that the plaintiff could not make out a *prima facie* case

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simply by proving (as he did) that he was shot by the defendant, but that he had to go further and show circumstances attending the shooting which would show that it was unlawful. In this connection it is suggested that the act might have been accidental or justifiable, and the clear inference from the argument is that the burden was on the defendant to negative such possibilities. We do not think this is the law. Even in a criminal case, where the burden is on the Commonwealth to prove the charge beyond a reasonable doubt, there is a *prima facie* presumption that the accused intended the natural consequences of his act. The same presumption prevails in a civil case. "Where the act forming the basis of the action was essentially wrongful, it is not necessary for the plaintiff, in order to make out a *prima facie* case, to show, by direct evidence, either an intention to commit the act or that the defendant was in fault. The proof of the wrongful act is sufficient proof of such matters." 2 R. C. L., p. 575, sec. 56.

In 5 C. J., p. 664, the text says: "The assault or battery having been proved, it then devolves upon the defendant to justify or show facts in mitigation, and where he seeks to justify the burden rests upon him to show the justification, although a plea of not guilty is also filed, unless justification appears from the plaintiff's evidence."

For the reasons stated, we are of opinion that the judgment complained of must be affirmed. It is to be regretted, of course, that any officer claiming to have acted in the discharge of his duty should be required to pay damages for injuries which he has inflicted upon an alleged offender. We must remember, however, that if the testimony of the plaintiff in this case is true—and the jury could not have found the verdict unless it accepted that testimony practically *in toto*, and likewise rejected the defendant's evidence—then the officer in this case acted unlawfully and willfully, and the judgment is a righteous one. Officers of the law must be accorded the fullest protection in the discharge of

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their duties, but the liberty of the citizen is of equal importance, and nothing can so militate against the effective administration of justice and a proper regard for the law of the land as unlawful and reckless conduct on the part of officers who are charged with its enforcement.

Affirmed.

BUCKLES-IRVINE COAL COMPANY *v.* KENNEDY COAL CORPORATION.

(*Staunton, September 21, 1922.*)

1. EQUITY.—Establishment of Parol Grant of Right of Way—Part Performance—License—Easements—Proof of Existence of Grants—Evidence—Width of Right of Way—Purchasers for Value Without Notice.

Appeals from Circuit Court of Russell county.

Affirmed.

Bird & Lively and *Hall, Wingfield & Apperson,* for the appellants.

Jno. W. Flannagan, Jr., Burns & Kidd and *Greever, Gillespie & Divine,* for the appellees.

KELLY, P., absent.

These causes are suits in equity instituted by the appellants praying that the appellee, a corporation, engaged in coal mining and in operating a private railroad to and from its coal lands, (which at the time cause No. 1 was instituted was a narrow-gauge railroad and at the time cause No. 2 was instituted was being changed in construction into a standard-gauge railroad, and which is located upon and across two separate parcels of land, one of 19 acres and the other of 3½ acres, the surface of which belongs to appellants), may be enjoined and restrained

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from the operation and change of construction of such railroad upon or across the lands of appellants.

The appellee claims to have acquired, from the former owner of the surface of the 3½ acre tract and from the appellant, R. L. Reedy, as the former owner of the surface of the 19 acre tract prior to the acquisition of that tract by the partnership of appellants, the right to construct and operate said railroad as the appellee first constructed it and as it was proceeding to enlarge it as aforesaid, by parol contracts with such former owners, of which, as appellee claims, the appellants had full notice, actual or constructive, before appellants acquired such lands, which contracts have been so far partly performed on the part of the appellee, as it claims, that in a court of equity the appellee will be regarded as having acquired such rights as easements over the said lands of appellants.

The decrees under review refused the injunctions prayed for and dismissed the respective suits, thereby sustaining the aforesaid positions taken by the appellee.

The testimony, bearing upon the question of whether there were definite parol contracts entered into between the appellee and the said former owners of said lands, which gave the appellee the aforesaid rights of easement, is voluminous and conflicting. On the subject of the notice aforesaid to appellants of the existence of such contracts before appellants became the purchasers of said lands, there is practically no conflict in the testimony. It is uncontroverted that appellants had actual knowledge of the construction and operation of the railroad upon and across said lands from the beginning of such uses of the easements. Moreover it appears from the testimony for appellants that, before the partnership of appellants acquired said lands, the appellants had full, actual or constructive, notice of such contracts.

The following facts appear from the evidence, practically without conflict in the testimony:

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The coal lands of the appellee consist of some 7,000 acres of coal, with certain mining rights, on the waters of Sword's Creek, in Russell county, the nearest outside boundary line of such coal lands being about two miles from the Clinch Valley Division of the Norfolk & Western railway. It was decided that the coal operation would be installed, beginning at a tipple to be located about one and a half miles within the last named boundary line and that much farther up Sword's Creek, making the railroad about 3½ miles in length. For the first two miles it was decided that the appellee would procure conveyances in fee of the rights of way; but the Clinch Valley Coal and Iron Company, the then owner of the said 7,000 acres of land, owned the coal under all of the other lands over which the railroad would pass, including said 19 and 3½ acre tracts, and also owned certain mining rights over the surface of such lands; but it was not known by said promoters and officers at the time just what the latter rights were, so that they decided that, regardless of what the latter rights were, they would pay the owners of the surface actual damages caused by the construction of the railroad over such land, provided the owners would consent to the construction and operation of the road for the purpose aforesaid.

The said former owner of said 7,000 acres of coal lands, the Clinch Valley Coal and Iron Company, had held them for many years undeveloped. A railroad, connecting the proposed location of the coal tipple aforesaid with the Norfolk and Western Railway, was essential to the development of such coal lands and the route up Sword's Creek was the only practical route for the railroad. Prior to appellee's purchase of such lands, its promoters and subsequent officers, in February 1917, obtained from the Clinch Valley Coal and Iron Company a ninety-day option to purchase same at the price of $245,000.00, and decided to make the purchase if the rights of way for a standard-gauge railroad could be secured from the land owners along

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the aforesaid route, so that the properties could be developed and the coal marketed. Being a private company, the appellee, when incorporated, would, as the parties knew, have no right of condemnation of the right of way, but would be dependent upon acquiring such right of way by contract with the respective surface land owners affected. Thereupon, during the ninety-day option, the promoters and officers aforesaid had a survey made for the location of the railroad along the aforesaid route and arranged and held a public meeting and, subsequently, interviewed, or had agents interview, the surface land owners along the aforesaid 1½ miles end of the route, on the subject of obtaining from them permission to construct and operate such railroad for the purpose of developing and operating the said coal lands and marketing the coal therefrom. The land owners affected were found to be unanimously favorable to this development, being interested in many obvious ways. None of the fee simple rights of way on the two miles of the railroad aforesaid, before it reaches the outside boundary line aforesaid, however, is involved in these causes.

The purpose of the appellee to construct and operate a standard-gauge railroad over said route and that appellee would pay for the right to construct and operate the same for the purpose aforesaid over the 1½ miles of it from the said outside boundary line of the coal lands aforesaid to the proposed location of the coal tiple, whatever actual damages were occasioned by the construction, provided the owners of the surface of the lands over which that part of the road was to pass would consent to such construction and operation, was announced by appellee to and well understood by such owners.

Just here comes the conflict in the testimony on the subject of whether the then owners of the surface of said two pieces of land subsequently acquired by the partnership of apellants, gave such consent. R. L. Reedy, one of

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appellants was, as aforesaid, then the owner of the surface of said 19 acre tract, and one Mrs. Julia Vance was then the owner of the surface of said 3½ acre tract. The witnesses for appellee testify positively and circumstantially that both Reedy and Mrs. Vance gave the aforesaid consent, verbally, to which there was no limitation or condition attached, except the promise aforesaid made for appellee that it would pay whatever actual damages were occasioned the said Reedy and Mrs. Vance, respectively, by the construction of the railroad over their respective lands aforesaid. These witnesses further testify, in substance, that subsequently to the first giving of his consent, Reedy saw the president of the appellee company and stated to him that all the damages he (Reedy) wanted for the railroad over the said 19 acres of land was for the appellee company to agree to haul the coal from a certain other 9 acre tract of coal land owned by Reedy, when the railroad was in operation; and that the president, acting for appellee, agreed to this and further agreed with Reedy, how it would be hauled and how the price therefor was to be determined, and gave instructions to the manager of the appellee company accordingly, and that the company has been ready and willing, ever since the railroad was put in operation, to carry out that agreement. Reedy and Mrs. Vance, however, testifying as witnesses for appellants, deny that they ever gave the aforesaid consent. The appellants also introduced in evidence the testimony of other witnesses tending to show that the appellee did not obtain such consent from all of the other owners of interests in the surface of some of the other parcels of land over which the aforesaid 1½ miles end of the railroad runs next to the mine tipple aforesaid.

The appellee had an agreement with the Norfolk and Western Railway Company for a connection at Sword's Creek of a standard-gauge railroad; but before the appellee could construct such railroad the United States

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Government took over the railroads and refused to allow the appellee to build a standard gauge railroad. Hence at that time, only a narrow gauge road could be built on said route. For this reason the appellee first constructed and put in operation a narrow gauge railroad along such route.

The evidence shows, without conflict, that appellee certainly reached the *bona fide* conclusion that it had obtained from Reedy and Mrs. Vance, and from all the surface owners of land along the said 1½ miles end of the route aforesaid, the consent aforesaid. Thereupon the appellee decided to purchase and did purchase the said 7,000 acres of coal properties, making a large outlay of money therefor, and proceeded to construct and did construct by a further large outlay of money, the said railroad, making it, in the first instance, a narrow gauge road, for the reason aforesaid,—the narrow gauge feature of it being but a temporary one, the appellee intending to convert it into a standard gauge road as soon as the Government should release control of the railroads and the Norfolk and Western Railway Company was placed in a position to carry out the agreement aforesaid which it had made with appellee. Prior to the institution of the above entitled cause No. 2 the Government released its control of the railroads and the appellee obtained permission from the Norfolk and Western Railway Company for the connection of a standard gauge railroad from said Mine Tipple, as per said agreement between appellee and such Railway Company, and thereupon the appellee began the conversion of its railroad into a standard gauge road, which was sought to be enjoined by said suit No. 2.

We do not find it definitely stated in the record as of what date the narrow gauge railroad was completed. The reply brief for appellants states that it was completed in 1918. The appellee on June 14, 1919 paid Mrs. Vance $30.00 as the actual damages occasioned her by the con-

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struction of the railroad. It was paid her by check, on which there was the following notation,—"To cover damages in R. R. Constr." The check was accepted, and endorsed by Mrs. Vance, and negotiated by her, and it was afterwards paid by appellee. This payment was precisely in accordance with the contract on the subject of the right of way as the testimony for appellee tends to prove that contract.

There is an affidavit of Mrs. Vance, filed in evidence, in which she makes the statement that she accepted that sum as covering the actual damages occasioned her by the construction of the railroad because the general manager of the appellee company, prior to the construction of the road over her land, came to see her when she was living in her dwelling house located by the side of the railroad as it was subsequently constructed, and told her that he had the right to build the railroad over her land without paying her any damages, but that while the work was being done he agreed to pay her for the damages done to her crop of corn and cane; but that there was never anything said to her by anyone at any time about paying her for the right of way. The deposition of Mrs. Vance, in evidence, is to the same effect. The record, however, shows that it appeared from her chain of title that appellee had no right of way over her land for the aforesaid purpose unless acquired by agreement with her, and it does not appear that she ever in any way made any claim upon the appellee for any other damages or that she ever forbid, or objected to, the construction or operation of the railroad upon and over the said 3½ acre tract of land for the said purpose. Moreover, Mrs. Vance, as she testifies, sold the 3½ acre surface of land, through which the railroad passes, to appellants, after the narrow gauge road was built and was in operation. Her deed to appellants bears date August 10, 1920. And she says in her deposition, that neither when she made this sale nor at any other time, was she

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asked by any of appellants whether the appellee had acquired the right of way across this land, that the subject was never mentioned by her or by the purchasers.

Reedy testifies in chief that he was never even asked to give his consent to the construction and operation of the railroad until after the narrow gauge road had been completed and was in operation. He says that the appellee claimed at the time the narrow gauge road was constructed that it had acquired the right to construct and operate the aforesaid 1½ miles end of it from the Clinch Valley Coal and Iron Company, and that he, (Reedy), relied on that claim as being correct, until about a year after the narrow gauge road was completed, when he and some other parties were talking over matters upon the creek and they went to the clerk's office and found out what rights they thought appellee had,—meaning that they found out from the clerk's office that appellee had no right of way such as appellee claims, over the 19 and 3½ acre tracts aforesaid, appearing of record. The bill in cause No. 1 was filed August 18, 1920. So that Reedy admits, in effect, that he had learned from the clerk's office prior to the taking by appellants of the deed from Mrs. Vance, of date August 10, 1920 as aforesaid, that appellee had acquired no right of way over the 3½ acre tract of land unless under parol contract with Mrs. Vance and yet Reedy does not claim in his testimony that he ever made any enquiry on the subject before taking the deed from her to the partnership, although, as he also admits in his testimony, the $250.00, (all of the purchase money therefor except $5.00) was not paid until the deed was made.

The consideration of the testimony of Reedy and Mrs. Vance, in the light of all the circumstances disclosed in evidence, creates upon the mind a strong impression that the parol contract with Mrs. Vance claimed by appellee existed and that Reedy and the other appellants well knew this long before suit No. 1 was instituted.

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Moreover the testimony for appellee is to the effect that Reedy volunteered to and did zealously assist in getting the consent aforesaid for appellee of other surface land owners on the said 1½ mile end of the route. This Reedy denies, but, on cross-examination, he admits that in one instance he acted as agent for appellee in trying to get a portion of the right of way for appellee. He also admits that C. W. Boyd, who was afterwards the president of the appellee company, on an occasion when a third person was present, who was a witness for appellee, before such company was organized or it had bought the 7,000 acre coal properties aforesaid, told him, (Reedy), that the promoters of the appellee company "wanted to develop their coal holdings on the creek and would have to put in a railroad and that the railroad would have to go over (Reedy) a piece, and it made no difference what rights they had they wanted to go up there and did not want any friction and get into law suits;" and that Reedy replied that, "When he (Boyd) got ready to put a railroad through his (Reedy's) land, to come right on;" and that he (Reedy) told Boyd, on this occasion that he (Reedy) "wanted the coal hauled off his coal land and wanted the railroad put up there for development;" and Reedy, after first saying that Mr. Boyd and his associates claimed "all the time" that they had acquired the rights of way in question from the Clinch Valley Coal and Iron Company, when asked if Boyd made the claim on that occason, (when the witness for appellee just referred to was present), first said that "I don't remember," then that "I don't know that he did." The third person present on the occasion just referred to, when put on the witness stand corroborated the testimony of Boyd for appellee, to the effect that Reedy on that occasion added to the statement, which he admitted, the further statement, to the effect that all the consideraion he wanted for his consent to the construction and operation of the rail-

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road by appellee was to have the coal hauled from his 9 acre tract.

Further: Reedy also admits that the General Manager of the appellee showed him where to put his tipple so that the appellee could haul the coal from Reedy's 9 acre tract, but he doesn't remember whether the General Manager told him that Mr. Boyd had instructed him to haul the coal off the 9 acre tract any time Reedy got ready. Reedy then admits that the General Manager told him at that time, and also later on, that appellee would haul the coal for him, (Reedy), but adds that Mr. Boyd told him that they had decided not to haul any coal for anybody; adding that "he didn't tell me right out. He told me that they had decided not to haul coal for anybody," and Reedy admits that he never constructed a tipple to ship the coal from his 9 acre tract and never made any attempt to ship the coal; Reedy also makes other admissions in his testimony, too numerous to be further alluded to here, which weaken very sensibly the credibility of his testimony where it is in conflict with that for appellee.

Only a few further facts will be mentioned; namely:

About two years after appellee had completed the narrow gauge railroad, C. C. Irvine, one of the appellants, obtained an option on what is referred to in the record as the "Jackson Coal property," consisting of some 90 acres of coal land, which is located in the same vicinity as the coal property of the appellee. Subsequently the partnership of appellant was formed, the option on the Jackson property was closed, and the partnership of appellants became the owner of this property. According to the clear preponderance of the evidence Irvine, before the option on the Jackson property was closed, was expressly notified by the president of the appellee company that appellee's "arrangements for right of way over the Reedy land, or any other land where (the) railroad was, was absolute and sufficient for the purpose (appellee) wanted to use

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it for," and that the appellee could not be forced to haul coal from the Jackson property. However the appellants thereafter took title to the Jackson property and after repeated efforts to force appellee by threats of litigation to consent to haul the coal from the Jackson coal property, finally, upon appellee's continued refusal to do so, instituted the above entitled suit No. 1.

Further, just before said suit No. 1 was brought, the president of the appellee company had an interview with appellant Reedy, in which, as Reedy admits in his testimony on re-cross-examination, the president told Reedy that the appellee was willing to haul the coal from Reedy's 9 acre tract aforesaid, "as he had promised to haul it for him" (Reedy); but was not willing to haul the "Jackson coal."

Further: Not until after appellee refused to haul the "Jackson coal" did Reedy, or any of appellants, object to the construction or operation of the railroad by appellee.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court.

There are a number of interesting questions presented by the assignments of error and ably argued by counsel, both for appellants and appellee, in the briefs and orally before us; but we find it necessary to consider and decide only those which will be dealt with in their order as stated below.

The first question we shall consider is the following, namely:

1. Does the preponderance of the evidence clearly establish that there were parol grants to the appellee, from the former owners of the surface of the lands affected, of the rights of way in question, which grants, were so far executed, prior to suit, by part performance on the part of the appellee, that it would be inequitable to rescind them, so that the grants will be upheld in equity as irrevocable, on

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the same principle that a partly performed parol contract for the sale of land would be upheld?

This question must be answered in the affirmative.

1a. Whether the doctrine in question is applicable to a mere license, so that an easement may be created thereby, when partly performed, has been the subject of an irreconcilable division of opinion among the American authorities. As said in note to the case of *Lawrence* v. *Shringer*, (N. J.), 31 Am. St. Rep. 702, at p. 712 *et seq.*: "The authorities upon this branch of the law have ever been and still remain so conflicting as to make their reconciliation totally impossible upon any conceivable theory." In this note cases pro and con are cited. That such doctrine is not applicable to a mere license, so as to create an easement, even though partly performed, is said, in 18 Am. & Eng. Enc'l of Law (2nd ed.) pp. 1145-6, to be the prevailing rule in America: But what is a mere license within the meaning of these authorities is a very wide equity indeed, which, however, in view of the considerations upon principle and the authorities now to be mentioned, we do not find ourselves called upon to consider further than we do below.

It seems to be the practically unanimous holding of the authorities that the doctrine in question is applicable to the parol grant of easements, such as the right of way in question in the causes before us. See note to the case of *Smith* v. *Garbe*, 136 Am. St. Rep. at pp. 686 *et seq*, and authorities cited; 1 Minor on Real Prop. sec. 136, quoted with approval in *Kent* v. *Dobyns*, 112 Va. 586; 10 Am. & Eng. Ency'l of Law (2nd ed.) p. 412; 9 R. C. L., sec. 15, p. 746; 1 Minor on Real Prop secs. 132, 133.

As said in the note just cited, at p. 692: " * * *. The statute of frauds, as it is well known, is evaded in so many other instances by part performance of obligations, that it would be strange indeed if it did not also include the parol creation of an easement. In *Wynn* v. *Garland*,

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19 Ark. 23, 68 Am. Dec. 190, the court, in announcing the application of the doctrine, said: ' * * notwithstanding the grant of an easement is embraced within the statute of frauds, and therefore must be in writing, yet it has been holden that a parol grant executed will be upheld and sustained under the same circumstances and on the same principle that a parol contract for the sale of land would be: See *Ricker* v. *Kelly*, 1 Me. 117, 10 Am. Dec. 38.' The doctrine is so generally well known that we do not devote further space to it here."

In 1 Minor on Real Prop., sec. 136, this is said: "It seems, however, to be admitted that if the transaction be one which, if it were *under seal, would create an easement*, it being classed as a license merely because it is *oral*, upon a *part performance* thereof by the licensee by the expenditure of money, or otherwise, a court of equity may regard it as an *equitable easement*, and therefore irrevocable."

This statement of the law is cited with approval, as aforesaid, in *Kent* v. *Dobyns*, 112 Va. 586, and is very helpful towards discovering a practical distinction between an easement and a license where, as said in 10 Am. & Eng. Enc'l of Law (2nd ed.) p. 413, "the line of distinction * * * is often obscure." See also what is said in sections 132 and 133 of Mr. Minor's learned and valuable work above cited, to the effect that a grant, which creates any interest or estate in land, is not a license, and creates an easement. See likewise note to *Ricker* v. *Kelly*, 10 Am. Dec. pp. 42-3, on the same doctrine as applicable to parol creations of any interest or estate in land.

And there is a class of cases, which, while not inclusive of all easements which may be created by parol under the doctrine under consideration, are yet so far on the hither side of the line of distinction just mentioned that few, if any, of the authorities have any doubt in treating them as involving easements created by parol; whether the method by which they are created be designated a

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"license," or by some other name. In that class of cases the grant, or consent, or license involved, to use the land of another, consists, not merely in the permission given one to do something on his own land which injuriously affects, or puts a burden upon the land of the person giving the permission, but which consists of the right to build and use, for a definite purpose, some structure on the land of the latter, and where the structure is accordingly built by the former, at large outlay of expense, which would not have been made but for the permission having been given; and the right is held to be a contract right acquired by purchase for valuable consideration, which, indeed, does not rest entirely in parol, and which is coupled with an interest, creating an interest in the land, and which, as it is believed, the great weight of authority, holds to be, in equity, at least tantamount to, if not technically, an easement. The opinion of the court in *Laurence* v. *Shringer*, (N. J.), *supra*, (31 Am. St. Rep. 702), calls attention to this class of cases. This is there said: "When A permits B to build a house upon his land, the situation almost necessarily implies the existence of some contract, which is thus partly performed between them; to some extent, therefore, such a matter does not rest absolutely in parol, and the area of possible fraud or perjury is therefore thus circumscribed and hindered. But when B from his own land, turns drains into the drains on the land of A, the situation does not imply a contract. On the contrary the situation denotes simply a trespass; consequently the existence and character of the contract, if one exists, is the pure creation of parol testimony."

When the test furnished by the authorities referred to above is applied to the rights of way in question in the causes before us we see that they constitute, either easements, or what, in reason and by the great weight of authority, is, in equity, tantamount thereto.

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2a. But it is contended on behalf of appellants that the evidence in these causes does not establish the existence of the parol grants of the rights of way in question,—at least not by that degree of certainty of proof which is required to establish a parol contract for the sale of land. The testimony on this subject is conflicting. It has been referred to in the statement preceding this opinion to an extent which it is believed sufficiently discloses the nature of the controversy and of the conflicting testimony. The conflict is so sharp that the testimony cannot be reconciled. Where the truth lies depends upon the credibility to be given the conflicting testimony of the respective witnesses on the subject, when read in the light of the uncontroverted facts touching the surrounding circumstances. We deem it sufficient here to say that the internal evidence furnished by the manner in which the testimony of the respective witnesses was given, and the inferences to be drawn from the uncontroverted facts and from the testimony itself, satisfy us that the existence of the parol grants of the rights of way is clearly established by the preponderance of the evidence; and as clearly as a parol contract of sale of land is required to be established by the well settled rule on that subject, where possession of the land has been taken and improvements have been made thereon,—that being in principle the situation involved in the instant causes.

2. Are the parol grants proved sufficiently definite in their terms, with respect to the width of the right of way, to authorize the appellee to first construct and operate a narrow gauge and subsequently a standard gauge railroad?

This question must be answered in the affirmative.

The proof is that the grants in the first instance authorized the construction and operation of a standard gauge railroad. Because of the unexpected interposition of the United States Government the appellee was temporarily prevented from so constructing the railroad in the first

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instance. Appellee thereupon proceeded with the construction and operation authorized to the full extent that it then could. The land owners affected acquiesced in this at the time. Subsequently and promptly following the release of the government control of railroads appellee began the conversion of the narrow gauge into a standard gauge railroad, which was merely fully executing the grant in pursuance of the original contracts proved.

In *Atkins* v. *Bordman*, (Mass.), 37 Am Dec. 100, at p. 106, this is said: "When no dimensions of a way are expressed, but the object is expressed, the dimensions must be inferred to be such as are reasonably sufficient for the accomplishment of that object." See also, to the same effect, *Frank* v. *Benesch*, (Md.), 28 Am. St. Rep. 237.

3. Are appellants purchasers for value, without notice of the aforesaid easements over the lands affected, so that the doctrine of the parol grant of such easements, which we have above considered, cannot be held applicable in the causes before us?

This question must be answered in the negative.

It is settled, and, of course, well understood, that the doctrine mentioned is not applicable as against purchasers for value without notice of the easement. But in the cases involved in the instant causes, in so far as the 19 acre tract of land is concerned, the appellants, being partners, were affected at the time the partnership acquired such parcel of land with the same notice which the appellant Reedy, the former owner of it, theretofore had of the existence of said right of appellee to the said easement thereon and thereover; and the prepondrance of the evidence clearly shows, that that notice was actual, full and complete. So far as the other tract, of 3½ acres, is concerned, the preponderance of the evidence also clearly shows, that before any purchase money was paid by the partnership of appellants and before the deed thereto was made to the latter by Mrs. Vance, the former owner of such parcel of land,

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the appellants had what amounted to actual notice of the existence of said right of appellee to the said easement thereon and thereover.

Moreover, the condition of both parcels of land, at the time the partnership of appellants became the purchaser thereof, showed plainly and unmistakably that the easements aforesaid had been in use, were in use by appellee, and were intended for such use. In such case, as is well settled, the appellants, as a partnership, "are presumed to have contracted in reference to the condition of the property at the time of their purchase," and, hence, took such parcels of land subject to the rights of appellee to the easements. *Scott* v. *Moore*, 98 Va. 668; *Sachs* v. *Owens*, 121 Va. 162.

The decrees under review in both of the above entitled causes will be affirmed.

Affirmed.

CLINTWOOD COAL CORPORATION *v.* TURNER, ET AL.

(*Staunton, September 21, 1922.*)

1. APPEAL AND ERROR.—Appealable Decree—Refusal of Injunction—Finality—Code, sec. 6336.
2. MINES.—Lease—Abandonment and Forfeiture—Conduct of Lessee.

Appeal from Circuit Court of Dickenson county.

Affirmed.

A. A. Skeen and *S. H. & Geo. C. Sutherland*, for the appellant.

W. A. Daughtery and *S. P. Riddle*, for the appellees.

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KELLY, P.:

This suit in equity was brought by the Clintwood Coal Corporation to enjoin John R. Turner, F. J. Turner and Nancy Turner, and their lessee, Hibbard Fleming, from operating a coal mine on the land owned by the Turners, and to require the defendant to account for rents and profits alleged to be due for past operations. The relief prayed for was denied by a decree of the circuit court, and thereupon the coal corporation obtained this appeal.

On July 26, 1917, Charles R. Turner, father of the three Turners mentioned above, "for and in consideration of the sum of one dollar cash in hand paid to the party of the first part (Turner) by the party of the second part (coal corporation)," and for the further consideration thereinafter more fully set forth, leased to the coal corporation "for the purposes of prospecting, mining and manufacturing coal" a tract of land in Dickenson county containing about thirty acres. The lease was to be effective for a period of ten years, and at the expiration of the term all structures and improvements, such as buildings and tipples, placed on the land were to become the property of the lessor and left on the premises, but the steel rails and machinery, tools, etc., were to remain the property of the lessee. It was further provided that the lessee should not own or operate any commissary on the premises, this privilege being expressly and exclusively reserved by the lessor. The royalty to be paid was fifteen cents a ton on all coal mined and shipped from the premises, the quantity to be determined by railroad shipments, and settlements to be made monthly. The lease further contained the following covenants and stipulations:

"The party of the second part agrees and binds itself to use its best endeavors to put out as much coal per day as possible after getting the said operation started, taking into consideration the disadvantages that it may incur in the employment of labor, strikes, car shortage, high water, etc.,

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for which the party of the second part does not stand responsible, it being the intention to push this work as speedily as possible so as to make the output as heavy as reasonably can be, under the particular circumstances governing this operation.

"It is further agreed and understood that if for any cause during the existence of this lease the party of the second part may desire to terminate the same then it shall have the right to do so by turning back to the party of the first part the premises embraced in this lease, together with any permanent improvements placed thereon, such as houses, etc., not including machinery, tools, etc."

Shortly after the execution of the lease, the coal company proceeded to open and operate a mine on the premises. The operation was a small one. The coal opening was about a mile from the railroad, and the coal was hauled from the mine in wagons and loaded into railroad cars. The lessee continued the work until the latter part of August 1918, when it quit because, as it claims, the mine could not be worked at a profit. Such equipment as the lessee owned was left at or in the mine.

On the 22nd of September, 1919, more than a year after the coal company had ceased to operate, Charles R. Turner conveyed to his two sons, J. R. and F. J. Turner, and his daughter, Nancy Turner, a tract of land which included the leased premises, and the deed therefor contained this clause: "And it is expressly understood that the parties of the second part *is* to stand good for a lease made by C. R. Turner and wife to the Clintwood Coal Corporation, provided said coal corporation has a *rite* to mine said coal but said second parties *is* to have the royalty."

When the lessee ceased its operation in August 1918, it was financially embrassed, and among the debts which it owed was one to Charles R. Turner in the sum of $180.00 for royalties and for hauling coal from the mine to the railroad. Turner was unable to collect this debt by per-

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suasive means, notwithstanding a number of attempts, and finally in October 1919, obtained a judgment therefor before a justice of the peace. Proceeding under an execution issued on this judgment, the deputy sheriff levied on the mine equipment and on the lease, and sold the same at public auction. An attorney representing the company was present at the sale, and, so far as appears, made no protest. The lease and the tangible personal property (except a small portion of the equipment not embraced in the first levy, and sold later) was sold on the 10th of December, 1919, and bought in by or on behalf of J. R., F. J. and Nancy Turner, the grantees in the above mentioned deed. Whether the levy on the lease and the subsequent sale thereof were valid is a question which has been discussed at length in the oral argument and briefs in this case, but need not be decided, for reasons hereinafter appearing.

From August 1918 to December 1919, when the sheriff's sale was made, the mine and personal property had been almost wholly neglected. The plant had fallen into very bad condition and required a good deal of work before it could be again operated. Subsequent to December 1919, the Turners worked there on a small scale for a short time, and then, in March, 1920, leased the property to Hibbard Fleming, who has since possessed and operated the same.

Soon after the sheriff's sale of the property the price of coal began to advance, and a short time after the Turners leased to Fleming the mine here involved, like all others in that locality, began to yield handsome returns.

The evidence is in conflict in some particulars, and is very unsatisfactory as to just when or how the representatives of the coal company notified the lessor of its purpose to quit the operation. At any rate, the lessee did quit in August, 1918, and did not make any serious effort to resume until after the lease had been made to Fleming. After that time the coal company seemed to become more and more

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interested because of the advancing price in coal until this suit was finally brought. At that time coal from this mine was bringing something in excess of $14.00 per ton f. o. b. cars at the railroad, and this price yielded a profit to the operator of about $9.00 per ton.

1 }

1. The appellees moved to dismiss on the ground that no appeal lies from a decree refusing the injunction. The facts material to the motion are these: On July 26, 1920, the complainant notified the defendant that on August 4th it would move for an injunction, and on the latter date the bill and certain affidavits, and the defendant's demurrer and answer and certain other affidavits, were presented to the judge in vacation, and an agreed decree was entered to the following effect:

"Upon consideration whereof, and by agreement of the parties this case is further continued for a period of 30 days, for the purpose that each party may in that time take and file such depositions as each or either of them may desire, and by agreement of the parties this cause is to be submitted to the Court, not later than the expiration of the said 30 days, or to the Judge in vacation for a final determination thereof, and any decree so entered by the said Judge in vacation, by this agreement is to be of the same force and effect, and binding as if the same was entered in term time, and this cause is continued till the 7th day of Sept. 1920."

Pursuant to this decree the parties took all the proof desired on either side upon the merits of the controversy, and on September 14, 1920, in the vacation of the court, the following decree was entered:

"The above entitled cause having been argued by counsel for both parties, respectively, at a former day and now coming upon the papers formerly read, the order entered in the cause heretofore, the depositions taken in behalf of the complainants, and defendants, respectively, the briefs

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of counsel and the same having been duly considered, and being of opinion that complainants are not entitled to the injunction prayed for, the same is refused."

It is perfectly clear that the court and the parties understood that the case was submitted for a decree upon the merits. No further proof was desired or contemplated on either side, and the court took the case "for final determination" pursuant to the agreed decree formerly entered in the cause. If the court had been of opinion to award the injunction, it would then have been necessary to refer the cause to a commissioner to take an account, but having decided that the complainant was not entitled to the relief prayed for, nothing remained to be done except to dismiss the bill at the complainant's cost. The failure to do the latter was doubtless a mere oversight or inadvertence. The decree necessarily adjudicated the principles of the cause, and was clearly appealable. Code 1919, section 6336. The motion to dismiss is overruled.

2

2. In our view of the case the decisive question is whether the coal company's conduct and attitude with respect to the operation of the mine amounted to an abandonment, and operated a forfeiture of the lease. This question must be answered in the affirmative. Nothing of value was paid for the lease. No consideration moving to the lessor was contemplated or provided for except the royalties on coal actually shipped, and the benefit to be derived from a commissary to be operated by the lessor, the value of which depended solely upon the operation of the mine. If the lease had been silent on the subject, there would have been an implied condition that the lessee should begin to prospect and to operate the mine within a reasonable time. See *Cowan* v. *Radford Iron Co., infra.* The lease, however, specifically stipulated for an active and energetic prosecution of the work. None of the disadvantages, such as "employment of labor, strikes, car shortage, high water,

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etc.," for which the lessee was not to be held responsible, appear to have affected the operation. It was contended, and there was evidence to support the contention, that governmental regulation of coal prices and denial of the use of box cars for coal shipments rendered the operation unprofitable; but there was no shortage of regular coal cars. There was no mention of any condition allowing the lessee to cease operations except that which permitted him to quit permanently and surrender the lease.

There is some confusion in the testimony as to what, if anything, passed between the parties at and after the mine were closed by the lessee, but this is immaterial, because the coal company squarely and unequivocally takes the position in this suit that it had the right to quit work until it could operate at a profit, and that it proposed to hold on to the lease for the full term of ten years without striking a lick unless it could do so at a profit. It did stop work for more than a year, failed and refused in the meantime to pay the balance which it owed the lessor, left the mine without care or attention, permitted the property to fall into bad repair, and evidently intended to leave it thus throughout the term of the lease, unless in its arbitrary judgment it could go back to work at a profit. To be sure the lessee claimed to expect conditions would get better, but that is besides the mark. The fact remains that it did not intend to operate unless it could do so at a profit, and yet did not intend to surrender its claim upon the lease until the end of ten years. This meant that the lessee might deprive the owner of any use of or income from the property until the end of the term.

In view of these facts it is perfectly manifest that the lessee has no right to an injunction.

The lease, as we construe it, meant that, subject to labor troubles and other causes specifically stipulated against, the lessee was bound to operate the property and prosecute

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the mining continuously and with reasonable diligence throughout the term of the lease, regardless of the question of his own profit. If he found that he could not operate the property at a profit, his remedy was clear and adequate, because there was an express stipulation giving him the right to quit, but when he did so, he had to surrender the property in the manner therein provided for. He could not play fast and loose with it.

The following language of this court in *Rorer Iron Co.* v. *Trout and Wife,* 83 Va. 397, 409, is pertinent: "The lease was for a term of twenty years; yet looking to its nature and object it cannot be contended that the lessee had the option to work or not to work the ore mine for an indefinite time, and thus convert what was designed to yield a handsome daily income to the lessors into a mere barren encumbrance on his land, a cloud on his tltle an incubus and a manacle which would oppress him and destroy the marketable value of his land."

In the case of *Cowan* v. *Radford Iron Co.,* 83 Va. 547, 550, it appeared that the lessee "did not propose to mine iron ore at a loss nor would they allow others to operate this iron ore at a profit." The court held that the lessee could not be allowed to maintain any such inequitable and unreasonable position, and entered a decree cancelling the lease. In that case the court said: "Regard should be had to the intention of the parties, and such intention should be given effect. To arrive at this intention, regard is to be had to the situation of the parties, the subject-matter of the agreement, the object which the parties had in view at the time, and intended to accomplish. A construction should be avoided, if it can be done consistently with the tenor of the agreement, which would be *unreasonable* or unequal, and that construction which is most obviously just is to be favored as most in accordance with the presumed intention of the parties."

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It is further pertinently said in the *Cowan Case, supra;* "The agreement in question may be denominated a 'mining lease.' The ore and minerals are sold, and the purchaser is invested with the usual mining rights, which are enumerated. These rights are to begin at once, at any time after the date of the agreement, the compensation is to be paid *quarterly,* as the iron ore is mined. No time is specified for the work to end, and for these rights to expire. But a stipulation is inserted, by which it is further and expressly agreed that the company shall have the right and privilege of removing from the said tract of land, at any time, any machinery, buildings, fixtures, or improvements made or erected upon it by the said company. If one party may, then, terminate the lease at any time, it may will it; if this estate is at the will of one of the parties, it is equally at the will of the other."

We do not mean to say that the lease here involved was a lease at the will of either the lessor or lessee. It was a lease for ten years liable to be terminated suddenly by the exercise of the option of the lessee. 1 Minor on Real Property, p. 455, sec. 379. But while the termination of the lease was to be at the will of the lessee, he could not terminate it without suffering the consequences. Read as a whole, the lease meant that the lessee must operate or quit, and if he quit, there was a mutuality of obligation, the lessor being bound to release him, and the lessee being bound to surrender the lease permanently under the terms therein specified. The construction contended for by the lessee in this litigation is inequitable and cannot be sustained.

It is, of course, competent for a lessor to confer upon the lessee the right to operate only so long as he can make a profit, but this right must be clearly provided for. The general rule of interpretation, and the one consonant with reason, is that where the only consideration for a mining lease is the royalty on coal actually mined, the lessee must

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operate with reasonable diligence, and failing in this, must surrender the property. This is exactly the holding of this court in *Cowan* v. *Radford Iron Co., supra.*

In *Shenandoah Land Co.* v. *Hise,* 92 Va. 238, Judge Cardwell speaking for this court, and expressly re-affirming the principles announced in *Cowan* v. *Radford Iron Co.,* in the course of the opinion said: "The contention of the appellant is that by this agreement Nicholas required title to all the minerals on the lands of Sheffer to which the agreement had reference, for the period of 99 years, with the additional right of renewal for a like term, and that the question of abandonment does not enter into the case; in other words, that this agreement is irrevocable. This contention cannot be maintained. The record shows that no consideration passed from Nicholas to Sheffer when the agreement was made, and therefore the real consideration moving Sheffer to enter into the agreement was the one-fourth of the profits of the minerals to be mined from this land. 'Nicholas might never have taken any minerals from the land, and, in that event, if this agreement is held to be a conveyance of the minerals therein, it would be to hold that there had been a sale of the minerals without a consideration. It is true that there is no covenant in the agreement on the part of Nicholas to mine the minerals; but, to give effect to the agreement, it must be held that the acceptance of it by Nicholas amounted to an agreement on his part to mine the minerals to be found on the property, and within a reasonable time; otherwise, the agreement might prove entirely fruitless to Sheffer and those claiming under him. *Caldwell* v. *Fulton,* 72 Amer. Dec. 766; and *Grubb* v. *Bayard,* 2 Wall. jun. 81. It has been maintained as elementary law, by decisions of this court, as well as by courts of other States, that an agreement to do something other than to pay money, no time being expressed, means a promise to do it within a reasonable time."

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In 27 Cyc. the text, after stating on page 707 that "sometimes under the terms of the agreement the lessee is not required to work at a dead loss," on pages 708, 709, states the general rule as follows: "On the other hand, under contracts which bind the lessee to test within a certain time and upon discovery to work the mines within a certain time, or within a reasonable time, as the consideration upon which the lease is granted, and in which no rent or other compensation is reserved except that depending upon the result of the work and mining, it is held that the performance of the lessee's obligations is a condition upon which the lease depends, and therefore the failure to perform the condition works a forfeiture of the lease; that it is the duty of the lessee to exercise the mining rights conferred in a reasonable time and manner if no time is fixed in the instrument for such performance, and upon failure to so discharge his duty, a court of equity may set aside the lease."

In 20 Am. & Eng. Enc., 2nd Ed., p. 779, 780, it is said that "where the only consideration for the lease is a prospective royalty, failure to perform such covenants (to operate) will give rise to a forfeiture though no forfeiture clause is contained in the lease."

The authorities generally are to this effect, and citation thereof might be multiplied indefinitely. We cite only the following: *Loveland* v. *Longhenry*, (Wis.) 140 Am. St. Rep. 1068; *Starn* v. *Huffman*, (W. Va.) 59 S. E. 179; *Chandler* v. *French*, (W. Va.) 81 S. E. 825; *Petroleum Co.* v. *Coal Co.*, 89 Tenn. 381; 18 R. C. L. p. 1190, sec. 98.

For the reasons stated and upon the authorities cited, we are of opinion that the lessee, by breach of the conditions implied from the nature and the express terms of the lease, had forfeited its right to any further claim thereunder, and this being true, it is unnecessary to consider the otherwise interesting question presented somewhat fully

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to us in this case as to the validity and effect of the sheriff's levy upon and sale of the lease.

It has been insisted on behalf of the lessee that the provision in the deed from Charles R. Turner to his children hereinbefore set out, showed that he regarded the lease as still in effect at the time the deed was made, but we do not take this view of that provision. Its phraseology as a whole does not convey that idea. The lease was still outstanding and had never been formally cancelled, and this stipulation was evidently inserted merely as a matter of prudence.

As already pointed out, the decree appealed from in this case ought to have gone a step further and dismissed the bill at the cost of the complainant. We will amend the decree in this respect, and as thus amended, it will be affirmed.

Affirmed.

COLLINS v. CITY OF RADFORD.

(*Staunton, September 21, 1922.*)

1 INTOXICATING LIQUORS.—Warrant—Motion to Quash—"Error Apparent Upon Face"—Violation of City Ordinance—Failure to Plead or Prove—Municipal Courts—Appeal and Error—Code, secs. 4989, 4990—Second Offenses—Charge of Former Conviction—Acts 1922, Ch. 345—Code, sec. 4923—Transporting Ardent Spirits—Attempt—Specification of Acts.

2. IDEM.—Transporting — Attempt — Punishment — Instructions — Sufficiency of Proof.

3. IDEM.—Attempt to Transport—Argument of Attorney for Commonwealth—Interpretation of Instructions—Harmless Error.

Error to Corporation Court of city of Radford.

Affirmed.

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V. M. Sowder and *R. L. Jordan*, for the plaintiff in error.
H. C. Tyler, for the defendant in error.

KELLY, P.:

Upon an appeal from a sentence of conviction by the civil and police justice of the city of Radford for a violation of a city ordinance, the defendant, Albert L. Collins, was tried by a jury in the Corporation Court of said city, found guilty, and sentenced to the payment of a fine of $100 and imprisonment in jail for six months. To that sentence this writ of error was awarded.

1 }

1. The record shows that the defendant made a motion in the corporation court "to quash the warrant for error apparent upon its face, but assigned no other ground therefor." The obvious meaning of this language is that the motion was general, and pointed out no specific objections to the form of the warrant. The motion was overruled, and this action of the court is assigned as error.

The warrant was as follows:

"Virginia,—City of Radford, to-wit:

"Whereas, R. H. Moore has this day made complaint and information on oath before me, John H. Stump, civil and police justice of said city, that Albert L. Collins did, on the.....day of January, 1921, and within twelve months last past, and within the city limits, unlawfully transport, sell, keep or store for sale, ardent spirits; the said Collins having previously, to-wit, on the 25th day of December, 1920, been convicted of storing and keeping for sale ardent spirits in the said civil and police justice's court and fined four hundred dollars and costs, and sentenced to serve sixty days in jail, which jail sentence was suspended by the said civil and police justice during the good behavior of the said Albert L. Collins.

"And the said Albert L. Collins, on the.....day of January, 1921, and within twelve months last past, within

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said city limits, did attempt to transfer, sell, keep or store for sale ardent spirits.

"These are, therefore, in the name of the Commonwealth of Virginia, to command you that you forthwith apprehend and bring before me the body of the said Albert L. Collins to answer the said complaint and information, and to be further dealt with according to law. And I further command you that you summon R. H. Moore and Herbert Gibson as witnesses to testify against the said Albert L. Collins, in behalf of the Commonwealth.

"Given under my hand and seal this 4th day of February, 1921. John H. Stump,

"Civil and Police Justice. (L. S.)"

We do not see anything on the face of this warrant which can be regarded as seriously irregular or defective. It did not specifically charge a violation of a city ordinance, and it concluded in the name of the Commonwealth and not in the name of the city. But it did show that it emanated in the city of Radford, for an offense against the prohibition law committed within the city limits, and that it was issued and was to be tried by the police justice of that city, whose jurisdiction, as to such offenses, was expressly confined by law to infractions of city ordinances. See act creating his office, approved March 20, 1920, Acts 1920, page 275, section 24 (prohibition law), and Acts 1918, page 598. There is no law prescribing any special form for the conclusion of a warrant, and the conclusion of this one in the name of the Commonwealth, even if irregular, was neither misleading nor inconsistent. "In the last analysis, the municipality is, after all, but a *mere arm or agency of the State*—and its power to punish is by direct delegation from the State." Lile's Notes on Municipal Corporations, section 138.

The case having originated in a municipal court of exclusive original jurisdiction, it was not necessary in that

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court to plead or prove the ordinance. Lile's Notes on Municipal Corporations (1922), sec. 138a; 1 Dillon's Mun. Corp., sec. 413; 28 Cyc. 394; 17 A. & E. Ency. Law (2d ed.) 937; 2 McQuillin on Municipal Corporations, sec. 849; 15 R. C. L., p. 1077, sec. 16. There is practically no conflict of authority on this proposition.

Whether the same rule applies on appeals from municipal courts to State courts, where the trial is to be had *de novo*, as with us, is a question upon which there is a diversity of judicial decision. 15 R. C. L., p. 1078; 17 Am. & Eng. Ency. L. (2d ed.) 938; McQuillin Mun. Corp., sec. 861; 16 Cyc. 899. But the better-considered view is, in our opinion, that in such cases the State courts hold the same relationship to the ordinances as the municipal courts. The former are, in that respect, *pro hac vice*, the latter. 2 McQuillin on Mun. Corp., sec. 861; *Moundsville* v. *Velton*, 35 W. Va. 217, 13 S. E. 373; *Portland* v. *Yich* (Ore.), 102 Am. St. Rep. 633; *Steiner* v. *State* (Neb.), 110 N. W. 723; *Solomon* v. *Hughes*, 24 Kansas 211; *Downing* v. *Miltonvale*, 36 Kan. 740, 14 Pac. 281; *Milbank* v. *Crenlaken* (S. D.), 135 N. W. 711, Ann. Cas. 1914-C, p. 1231; *Galen Hall Co.* v. *Atlantic City*, 76 N. J. L. 20, 68 Atl. 1092; *Sidelski* v. *Atlantic City*, 84 N. J. L. 198, 86 Atl. 531; *Buffalo* v. *Stevenson*, 145 App. Div. 117, 129 N. Y. Supp. 125.

Both the police justice and the Corporation Court of the city of Radford were bound in this case to take judicial notice of the existence and effect of the ordinance; and there was no defect in the warrant by reason of its failure to allege the same.

We have adverted to the failure of the warrant to allege the ordinance, not because counsel have in any way relied upon or referred thereto, but because we have thought it well to express our views upon the question. It is involved, though not adequately raised, in two other cases decided by us at this term, to-wit: *Wamplers* v. *Corporation of Norton* and *Spradlin* v. *City of Roanoke*. The question is

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quite likely to arise at any time in the multitude of similar prosecutions which are now of almost daily occurrence, and it is not, so far as we know, settled by any other Virginia decision.

Furthermore, it ought to be observed in this connection that on the appeal to the corporation court the trial was expressly required to be conducted without formal pleadings (Code, sec. 4990); and the fullest provision is made for all amendments of the original warrant "in any respect in which it appears to be defective" (Code, sec. 4989). Under the broad terms of the section last cited, if there had been, as there clearly was not, any substantial reason to suppose that the accused did not know from the warrant what he was charged with, the court could even have gone to the extent of discarding entirely the original warrant, issuing a new one for the offense, and proceeding to trial on that. The provisions of the statute are intended to give the court a free hand in conducting the trial on appeal in such way as to guarantee to the accused every substantial right, on the one hand, and, on the other, to cut off frivolous and purely formal objections. See *Harding* v. *Commonwealth*, 105 Va. 858; *Flint* v. *Commonwealth*, 114 Va. 820; *Robinson* v. *Commonwealth*, 118 Va. 785; *Harley* v. *Commonwealth*, 131 Va. 664, 24 Va. App. 364, 108 S. E. 648.

In *Jones* v. *Commonwealth*, 100 Va. 842, 853, it was announced as the settled practice of this court to give the accused in a criminal prosecution the benefit of his demurrer to the indictment, or his motion to quash the writ of *venire facias* for error apparent on its face, although the special grounds of demurrer or the motion to quash were not pointed out. Whether, under our present statutory provisions regulating procedure in felony cases or under formal indictments, we would follow that rule is a question which we need not now decide, because it is certain that a different rule prevails in misdemeanor cases originating before a justice of the peace. *Harding's Case, Flint's Case,*

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Robinson's Case and *Harley's Case, supra.* A general motion to quash a warrant on appeal, which points out no specific objections, cannot, under the terms of our statute as interpreted and applied in the decisions above cited, avail after verdict as against any defect in form unless it appears from the record of the trial that the accused was or could have been prejudiced thereby. The dockets of the trial courts, as is only too well known, are crowded with criminal cases, many of them appeals from sentences imposed by magistrates and police justices. The statutes to which we have referred were intended to facilitate the prompt trial of cases—an end promotive of real justice to all parties—and we wish to make clear our purpose to further, as far as possible, with due regard for substantial rights, that increasingly important policy. No backward step in this respect is to be considered.

If it be suggested that the defendant could not know from this warrant whether he was charged with a municipal or a State offense, a sufficient answer is that the police justice had no jurisdiction as to violations of the prohibition law except in cases arising under ordinances of the city; that he "called upon the *plaintiff* for a bill of particulars," and got it before the trial, which showed that "the *city of Radford*" relied on "the charge of transporting ardent spirits," and "attempting to transport ardent spirits," and that in his petition to this court for the writ of error he complains of a judgment rendered against him "upon the trial of a warrant for a violation of the city ordinance of the city of Radford."

As stated before, it does not appear that any reasons whatever were assigned in the lower court for the motion to quash the warrant except unnamed "errors apparent on its face." We shall now proceed to consider the only grounds which are, under this general objection, relied on or mentioned in the assignments of error.

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It will be observed that the warrant contained two counts. The first charged that the defendant did "within twelve months last past and within the city limits, unlawfully transport, sell, keep or store for sale ardent spirits; * * * having previously, to-wit, on the 25th day of December, 1920, been convicted of storing and keeping for sale ardent spirits in said civil and police justice's court. * * *" The second count charges that, within twelve months prior thereto and within the city limits, he "did attempt to transport, sell, keep or store for sale ardent spirits."

The first point made against the form of the warrant is a mere *quaere*, presented in the defendant's petition without discussion or citation of authority as follows: "It is familiar practice where the statute provides for greater punishment for the second or third conviction to charge in the *indictment* former convictions; but can that be done before a magistrate, or in any forum other than a court of record?"

This *quaere* relates only to the first count. If the civil and police justice had jurisdiction to determine a charge for a second offense, it was clearly proper to make the charge in a warrant. Such jurisdiction is now expressly provided for by section 27 of the State prohibition law (Acts 1922, ch. 345). This express provision was not in force when the instant case was tried. But we need not pursue the *quaere* further, for reasons now to be stated.

No demurrer to the warrant was interposed and no motion was made to instruct the jury to disregard the first count. There was a general verdict of guilty, which might well have been found under the second count. This being true, even if the first count was bad, the regularity of the judgment was not affected thereby. (Code 1919, sec. 4923.)

Another objection urged to the form of the warrant goes to the second count, and is that it failed to allege that the accused attempted to "unlawfully" transport ardent spirits. If the objection were good as an original propo-

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sition, the presumption would be that the court, if the objection had been pointed out, would have amended the warrant. As will hereinafter appear, the evidence shows that the act which the accused was charged with having attempted, was clearly unlawful, and if he was guilty as charged, he was certainly in no way prejudiced by the omission of that word from the warrant. But this aside, the objection, if adequately raised and in due time, was without merit. The ordinance must have followed the State law as far as applicable. Acts 1922, ch. 345, sec. 27. Sections 3 and 3a of the act declare that it is unlawful to transport or attempt to transport ardent spirits, *except as thereinafter provided.* The word "unlawful" is not a part of the description of the acts which these sections prohibit. It declares that the acts themselves—that is, every transportation, etc., and attempted transportation, etc., of ardent spirits—shall be unlawful, except as thereinafter provided. Where the word "unlawful" does not form a part of the definition of the offense, and the act itself is declared to be unlawful, that word need not appear in the charge. And, while the rule as generally stated is that exceptions and provisos contained in the enacting clause of the statute must be negatived in a criminal complaint, and those which are not so contained may be omitted as being merely matters of defense, the more accurate statement of the rule is that only such exceptions and provisos as are essential to a description of the offense need be negatived, without reference to their position in the statute. It is certainly not necessary to negative an exception in a subsequent section which (as in this case) is merely referred to in the enacting clause, and is not a necessary part of the definition of the offense. 10 Ency. Pl. & Pr. 497, 498; *Hill's Case,* 5 Gratt. (46 Va.) 682, 690-691; *Hendricks' Case,* 75 Va. 923, 943; *United States* v. *Cook,* 84 U. S. 168, 21 L. Ed. 538, 539. The form of indictment contained in the prohibition act uses the word "unlawfully," but it is expressly provided in

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the act that this form is not exclusive, and that any good and sufficient indictment may be used. Section 60-b (Acts 1918, p. 615), in terms, provides that if the accused in any case claims the benefit of any exception, the burden is on him to prove that he comes within it.

It is also said (and this is the only remaining objection urged against the form of the warrant) that it should have specified the acts of the defendant constituting the alleged attempt, citing *Clark's Case*, 6 Gratt. (47 Va.) 675. It must be remembered, however, that *Clark's Case* dealt with a formal indictment, and also that the proceeding there involved was controlled by a general statute relating to attempts. Even if the prosecution in the instant case had been under an indictment, the point here made would not have been good. Section 3 of the prohibition law expressly provides for a conviction of an attempt under an indictment for a completed offense. It is clear that the prohibition act does not contemplate that the indictment, whether it charges an offense or merely an attempt, shall set out the specific acts constituting the same. A charge, either that the defendant transported ardent spirits, or that he attempted to transport them, is sufficient. Furthermore, in this case the defendant called for a bill of particulars, which stated that under the second count the city relied "upon the charge of attempting to transport ardent spirits," and it does not appear that any motion was made to require a more specific statement.

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2. We pass now to the merits of the case as actually made by the city of Radford against the defendant. It is conceded that the specific offense for which he was tried and convicted was an attempt to transport ardent spirits. It is not questioned that such an attempt, if proved, would constitute a crime under the city ordinance. This, indeed, seems to affirmatively appear from instruction No. 1, given by the court, which was as follows: "The court instructs

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the jury that if they shall find the defendant guilty of an attempt to transport ardent spirits, they shall fix his punishment at a fine of not less than fifty dollars nor more than five hundred dollars, and confinement in jail not less than thirty days nor more than six months, and if they believe from the evidence, beyond a reasonable doubt, that the prisoner had been previously convicted of violation of ordinance No. 226 of the city of Radford, then in that case they shall fix his punishment at a fine of not less than one hundred dollars and imprisonment in jail of not less than six months nor more than one year."

There is no contention that the foregoing instruction failed to correctly set forth the terms of the city ordinance. The penalty fixed by the jury is shown by stipulation of counsel to have been in conformity with such ordinance.

This brings us to the important assignment of error in the case, and the one chiefly relied upon by counsel for the defendant, which is that the acts shown in evidence as having been done by him do not in law constitute an attempt to transport ardent spirits.

A proper disposition of the question thus presented makes it necessary to briefly set forth the facts, and we quote the following substantially correct and practically complete statement from the brief of counsel for the defendant, the matter in parentheses having been added by us from the evidence as reported in full:

"The facts proven are these: That on the 25th day of December, 1920, petitioner confessed to a violation of the prohibition law and paid a fine of four hundred dollars and costs, and was sentenced to serve sixty days in the city jail, which sentence was suspended by the civil and police justice.

"That on the.....day of January, 1921, Albert L. Collins, your petitioner, went to a hay stack on the farm of a man by the name of Gibson, which is in the corporate limits of the city of Radford, and about one mile from the

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home of Albert Collins. That the said Collins had previously made arrangements with some person unknown to place a gallon of whiskey at said hay stack for him. That Collins went to the said hay stack between dusk and dark, and there felt for the whiskey. That Collins stated to Gibson and Moore, who arrested him, that somebody had promised to leave him some whiskey there, and when asked how much he stated a fellow was going to leave him a gallon. (That he paid this person twelve dollars, but did not know the person.) He did not say what he was going to do with it. He stated that he came to the hay stack for the whiskey. Prior to his going to the hay stack for the whiskey, Gibson had found the same in the hay stack and carried it to his barn, about one-fourth of a mile away from the hay stack, and then notified the policeman of the city of Radford. There was no whiskey at the hay stack at the time Collins was feeling for it, and he did not see it or get his hands on it (but reached into the place where it had been). That there was three gallons of whiskey found in the hay stack instead of one gallon." (He was arrested practically in the act of trying to get the whiskey.)

It may be well, in approaching the discussion of this branch of the case, to dispel the perhaps natural first impression that as the offense attempted was merely a misdemeanor, and as such attempt failed, the cause is one of trifling importance. The act which the defendant was charged with committing was not *malum in se*, and at common law an attempt to commit it would not have constituted a crime of any grade. But all fair debate as to whether the offense in question here is to be considered as a sufficient foundation for prosecution and conviction in the courts of this State is absolutely concluded by the terms of the statute, Acts 1918, chapter 388, section 3a, as follows: "It shall be unlawful for any person to attempt to do any of the things prohibited by this act. * * * And upon indictment for the violation of any provisions of this

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act the jury may find the defendant guilty of an attempt, etc."

Nor are we left without a guide as to the purpose and spirit with respect to which this law in all of its provisions is to be construed. Section 58 of the law (Acts 1918, p. 614) is as follows: "This entire act shall be deemed an exercise of the police power of the State for the protection of the State, for the protection of the public health, peace and morals, and the preventions of the use and sale of ardent spirits, and all of its provisions shall be liberally construed to effect these subjects."

To be sure, the courts must exercise judgment and discretion in construing any doubtful provisions in the act, but the terms of the statute leave no room to doubt that any willful attempt to violate the law in any substantial particular must itself be regarded as a crime and punishable accordingly. In other words, whenever we ought to sustain a conviction if the offense were consummated, we ought to sustain a conviction for conduct which in law amounts to an attempt to commit it. The law is expressly so written.

Now, in this case, it is idle to say that the act which the defendant was trying to commit would not, if accomplished, have been a serious violation of the law. It was charged and proved that he was an old offender, and he had deliberately laid his plans for another infraction of the law—one for which we have frequently affirmed sentences of conviction. Therefore, unless we are to say that all mere attempts, as distinguished from accomplished acts, are to be ignored in the prohibition law, and section 3a of the act practically nullified, the defendant in this case was a willful and substantial violator of the law and his conviction must stand, subject only to this question: Did his acts, combined with his purpose in trying to consummate his plan, amount in law to an attempt? We think they did.

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It is contended on behalf of the defendant that his conduct in going after the whiskey and reaching into the hay stack for it did not pass beyond the stage of mere preparation for the crime, and, further, that he could not be guilty of an attempt because the removal of the whiskey had rendered consummation of the crime impossible. We are unable to uphold these contentions. Much has been written with respect to attempts to commit crime, particularly as to the line of demarcation between preparation and attempted consummation, and as to attempts to commit crimes impossible of consummation. We shall not hope or endeavor to contribute anything new to this subject. The doctrine is said to be involved in much obscurity and confusion, but it seems fair to say that the general rules involved are well settled, that every case of attempt must be decided on its own facts, and that in most cases an application of the general rules need not be very difficult.

In order to constitute an attempt to commit crime, two elements are essential—first, the intent to commit, and, second, a direct ineffectual act done toward its commission. *Hicks* v. *Commonwealth*, 86 Va. 222, 226.

In this case the defendant's intent to get the whiskey and carry it away, if not conceded, is proved by conclusive and uncontradicted evidence, and it is in our opinion not less clear that in legal contemplation he performed a direct ineffectual act towards the consummation of that intention. It is not always easy to draw the line between acts of mere preparation and acts standing in proximate and causal relation to what would be a consummation of the offense if its commission were completed. It is here, and not in the statement of the general rule, that obscurity and confusion will sometimes arise. This case, however, is free from serious difficulty. It is difficult to conceive of a more immediate and direct act towards the consummation of the offense than the effort on his part to get possession of it by reaching his hand into the hay stack where it had ac-

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tually been recently placed by his procurement, and where he thought it still remained.

It is quite true that, owing to the recent removal of the whiskey, consummation of the attempt was impossible, but the impossibility of performance was not of a kind to rob his act of its criminal character. All the authorities hold that in order to constitute an attempt, the act attempted must not be impossible, but this rule has reference to inherent impossibility, and not to cases where the impossibility has been brought about by outside interference or grows out of extraneous facts not within the knowledge and control of the accused. 8 R. C. L., p. 280, sec. 298, and other authorities cited below.

The Virginia decisions dealing with attempts to commit crime, except in so far as they lay down the general rule as to the essential elements of the offense, are not very helpful in this case, because none of them are very similar in their facts.

The case of *Foster* v. *Commonwealth*, 96 Va. 306, relied upon by the defendant, is not at all in point. It belongs to that class of cases in which the law conclusively presumes that certain persons are incapable of committing certain crimes. This is an exception to the general rule that an impossibility not necessarily inherent, and not known to the accused, constitutes no defense. The distinction is pointed out in 3 Am. & Eng. Ency. L. (2d ed.), p. 270.

The case of *Hicks* v. *Commonwealth*, 86 Va. 223, especially relied upon by counsel for the defendant, contains nothing which in any way conflicts with the view that the defendant here was guilty of the attempt charged. The court in that case held that procuring poison and delivering it to a third person to be administered to the intended victim was merely an act of preparation, and did not have sufficient proximate and causal relation to the intended crime to constitute the requisite overt act. The intention to commit the crime was clearly shown, but the conduct of

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the accused got no further than preparation therefor and solicitation of a third party, who failed to take any steps towards carrying out the criminal design. In the instant case the defendant not only made all necessary preparation, but actually performed the final causal act which would have resulted in consummation of the offense but for the recent removal of the object without his knowledge.

In *Lynch* v. *Commonwealth*, 131 Va. 769, 24 Va. App. 549, 109 S. E. 418, 420, quoting in part from Wharton's Criminal Law (11th ed.), section 224, we said: "An attempt to be indictable and punishable 'need not be capable of success; * * * it being clear that apparent adaptation may constitute the attempt. * * * It is enough if there is a possibility * * *.'"

In *Commonwealth* v. *Jacobs* (Mass.), 9 Allen 274, Mr. Justice Gray said that "whenever the law makes one step towards the accomplishment of an object, with the intent or purpose of accomplishing it, criminal, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance."

In *People* v. *Moran*, 123 N. Y. 254, 20 Am. St. Rep. 732, the court said that, while the cases on the subject in England were not uniform, "in this country, however, the courts * * * have adopted the more logical and rational rule, that an attempt to commit a crime may be effectual, although for some reason undiscoverable by the intending perpetrator the crime under existing circumstances may be incapable of accomplishment."

In Freeman's note to the case of *People* v. *Moran*, *supra*, the learned annotator said: "It is a general rule that where an intended criminal result is not accomplished simply because of an obstruction in the way, or because of the want

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of the thing to be operated upon when the impediment is of a nature to be unknown to the defendant who used what seemed to be appropriate means, the criminal attempt is committed."

In 1 Bishop's Criminal Law (7th ed.), sec. 742, the author says: "In reason, the rule is that if there is an intent to do what in law constitutes a substantive crime, and the person intending such crime proceeds in its commission till interrupted by some unforeseen impediment or lack, outside of himself, special to the particular case, and not open to observation, he commits the indictable attempt." And this rule, the learned author says in section 743, represents the doctrine as established by the better considered American decisions.

The authorities in this country, generally, are to this effect, and citation thereof might be extended to indefinite length. We add only the following: 1 Wharton Cr. Law (11th ed.), sec. 224; 3 Am. & Eng. Ency. L. (2d ed.), p. 271; 16 C. J. 116; 8 R. C. L., p. 280, sec. 298.

It follows that the second assignment of error, which, while challenging the action of the court in giving and refusing instructions, is necessarily settled by the conclusion we have above announced, must be overruled.

3. During the closing argument of the case, the attorney for the city of Radford used the following language: "It makes no difference whether the liquor was ever put there. If he thought it was there and had previously made arrangements for it to be put there and went after it, then he is guilty of attempting to transport ardent spirits, although the liquor, as a matter of fact, had never been put there." To this language the defendant, by counsel, objected, but the court declined to sustain the objection and permitted the attorney for the city to rely upon the statement as a correct interpretation of the court's instructions upon the law of the case.

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This assignment of error raises a question which we need not decide. If the statement of the city attorney, as a proposition of law and as an interpretation of the court's instructions, was erroneous, it could not have prejudiced the defendant. The evidence showed that the whiskey had, as a matter of fact, been placed in the hay stack, and the defendant could not have been harmed by counsel's statement to the jury, that the prisoner would be equally guilty if no whiskey had ever been placed there. If there was error in the statement of counsel, it was error in an abstract proposition of law, and under the facts of the case entirely harmless.

For the reasons stated, the sentence of the corporation court is affirmed.

Affirmed.

COLLINS v. COMMONWEALTH.

(*Staunton, September 21, 1922.*)

1. CRIMINAL LAW.—Voluntary Manslaughter — Evidence — Instructions—Degree of Homicide.

Error to Circuit Court of Wise county.

Affirmed.

Morton & Parker, for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

KELLY, P.:

Upon an indictment for the murder of one John Brown, the defendant, W. C. Collins, was tried by a jury, found guilty of voluntary manslaughter, and sentenced to the penitentiary for a term of three years. To that sentence this writ of error was awarded.

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1. It is assigned as error that the court refused to set aside the verdict as being contrary to the law and the evidence.

A few minutes before the killing occurred, the defendant and the deceased had been doing some "side betting" on a game of cards. The deceased, who was drunk, lost twenty dollars to the defendant, and then forced the latter at the point of a pistol to return half of the loss. This broke up the game, and the participants, who had been playing out of doors on a hill near Norton, started away. The accused and the deceased had apparently made friends and were walking very close together a short distance from the others. Before they had gone far, the accused drew a pistol, and, with one hand on the arm or shoulder of the deceased, fired four shots at him, three of which took effect, producing instant death.

There is no serious conflict in the statements of the witnesses except as to the circumstances immediately connected with the shooting. In this latter respect, however, the evidence is in irreconcilable conflict. The theory of the Commonwealth is that the accused killed Brown to avenge the grudge against him for forcing a return of part of his winnings, while the theory of the defense is that Brown, being intoxicated and offensive and mad at Collins for winning the money from him, was attempting to draw his gun and shoot, and that the accused shot in self defense.

There was evidence to support each of these theories, and the case was peculiarly one for a jury to decide. It is unnecessary to do more in this connection than to say that if the evidence for the Commonwealth be fully credited and viewed in the light most favorable to its contention, the accused might well have been found guilty of murder in the first degree; while the evidence for the accused, standing alone and fully credited, would have warranted an acquittal. The jury settled the weight and credibility of

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the testimony, and under settled rules we cannot interfere with their verdict upon the facts.

2. Over the objection of the defendant the court gave the following instruction at the request of the Commonwealth:

"The court instructs the jury that every homicide in Virginia is presumed in the absence of other evidence, to be murder of the second degree and in order to elevate the offense to murder of the first degree the burden is upon the Commonwealth; and in order to reduce the offense to manslaughter, or to show a justification or excuse for the killing, the burden is upon the accused to introduce evidence sufficient to raise in the minds of the jury a reasonable doubt as to whether he be guilty of murder, or of manslaughter, or of any offense at all."

The objections made to this instruction are, first, that it improperly shifts the burden of proof upon the defendant, and, second, that "it requires the defendant to produce evidence to sustain the burden and does not take into consideration the fact that the evidence produced by the Commonwealth might of itself show justification."

Looking to this instruction alone, without regard to others given in the case, this must be said: The instruction is not in the usual form, and if anything in the evidence of the Commonwealth tended materially to rebut the presumption of murder in the second degree arising from the homicide as proved, and if the defendant had been convicted of murder in the second degree, the language used by the court might be open to serious criticism. But the alleged error is clearly harmless for two reasons —first, because upon a fair view of the evidence for the Commonwealth nothing appears therein upon which to base a plausible contention that the accused was not guilty of at least as high a crime as murder in the second degree, and, second, because the jury upon the whole evidence acquitted him of any degree of murder and found him guilty

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only of manslaughter. There is nothing whatever to indicate that in this finding the jury were influenced by the instruction complained of, and it follows that the accused was not prejudiced thereby. *Jarrell* v. *Commonwealth*, 132 Va. 551, 25 Va. App. 82, 92, 110 S. E. 430. Furthermore, the instructions as a whole were as favorable as the defendant was entitled to have them, and when read together left no room to complain of the irregularity in the particular instruction here under consideration.

3. Two of the instructions for the defendant were refused as offered, but given in slightly amended form. The accused excepted to the amendments and assigns error on account thereof, but offers no argument or authority to support the exception. We have been unable to discover any ground whatever for criticism of the amendments made by the court, and deem it unnecessary to make further reference to this assignment.

The judgment complained of is plainly right and will be affirmed.

Affirmed.

COOPER *v.* COMMONWEALTH (No. 76).

(*Staunton, September 21, 1922.*)

1 INTOXICATING LIQUORS.—Indictment—Allegation of Former Conviction—Instructions—Time of Commission of Second Offense—Penalty—Evidence—Proof of Former Conviction—Contents of Indictment.

Error to Circuit Court of Lee county.

Reversed.

Pennington & Pennington, for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile*, for the Commonwealth.

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BURKS, J.:

The plaintiff in error, hereinafter called the accused, was convicted under the prohibition statute (Acts 1918, ch. 388, p. 578) of a second offense of transporting and selling ardent spirits, and sentenced to a term of three years in the penitentiary. Several of the errors assigned raise the same questions that were disposed of adversely to the accused in another case (26 Va. App. —) and will not be further noticed.

The indictment contains no direct allegation of the conviction of the first offense, but only a recital thereof. It alleges the commission of an offense under the prohibition law, and then proceeds, "the said Rich Cooper having heretofore * * * been convicted of unlawfully manufacturing, selling * * * ardent spirits," etc. The former conviction should have been alleged directly, and not by way of recital. But no objection was made to the indictment by demurrer or otherwise, at any stage of the trial, nor in the petition for the writ of error, hence it is not necessary for us to pass on its sufficiency to sustain a conviction for a second offense. Code, sec. 4879. But see 1 Bish. Cr. Prac., sec. 77; Beale's Cr. Pl. & Pr., sec. 100; *Rand* v. *Com.*, 9 Gratt. (50 Va.) 738; cf., *Stover's Case*, 92 Va. 780, *Fitch's Case*, 92 Va. 824.

Exception was taken to the action of the trial court in giving to the jury the following instruction before the introduction of the evidence:

"This is an offense charging Richard Cooper here of selling and transporting liquor. This is the second offense. This indictment is for a felony, charging that he has heretofore been charged and convicted of selling and transporting liquor and the second offense constitutes a felony. If you find that the charge of selling and transporting liquor is made out, and you *further believe that a sale was made before this indictment was founded, that* would constitute a felony and under *that offense* the penalty is not less

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than one year nor more than five years, or not less than six months nor more than twelve months, and a fine of not less than $500.00. *And if you fail to make out a sale prior to this indictment,* but believe from the evidence that he has made this sale, you can find him guilty, and assess a fine against him of not less than $50.00 nor more than $500.00, and not less than thirty days in jail, nor more than six months."

We have italicized the objectionable parts of the instruction. Section 4 of the act under which the indictment was made, so far as need be quoted, is as follows:

"Any person who shall violate any of the provisions of section three and three-a of this act * * * shall be deemed guilty of a misdemeanor for the first offense, and of a felony for any subsequent offense committed after the first conviction; provided, that the offense of drinking, giving away, or receiving ardent spirits contrary to the provisions of this act, shall not be deemed a felony in any case; * * ."

If the jury followed this instruction they could have found the accused guilty of a felony if the first sale was made at any time "before this indictment was found," although there had been no conviction thereof. Such is not the provision of the statute. The statute in terms provides that, in order to constitute the subsequent offense a felony, it must have been "committed after the first conviction." The instruction was erroneous in not following this important provision of the statute.

At the conclusion of the evidence, the court gave the following instruction:

"The court instructs the jury that if you believe from the evidence beyond all reasonable doubt that the defendant sold ardent spirits within twelve months prior to May 30, 1921, and if you further believe beyond all reasonable doubt that Cooper has been guilty of selling ardent spirits, and if you believe beyond all reasonable doubt that such sale was

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made, you will find him guilty of the felony as charged in the indictment, and fix his penalty by confinement in the penitentiary at not less than one nor more than five years; or, in your discretion, by confinement in jail not less than six months nor more than twelve months, and by fine not exceeding five hundred dollars. But if you believe that the Commonwealth has failed to prove a prior conviction, as above set out, and further believe the defendant guilty of selling ardent spirits within twelve months prior to the finding of this indictment for which he is now being tried, you will find him guilty, and fix his punishment by confinement in the county jail at not less than thirty days and more than six months, and a fine not less than fifty dollars, nor more than five hundred. If you believe the Commonwealth has failed to prove the defendant guilty beyond a reasonable doubt as charged in the indictment, you will find him not guilty. The court further tells the jury that unless they believe beyond all reasonable doubt that Cooper was convicted of selling and transporting liquor before this indictment was made, upon which he is now being tried, you cannot find him in this case as being guilty of felony."

The first sentence of this instruction, directing the penalty to be inflicted, standing alone, is plainly erroneous, and the residue, or qualifying part, of the instruction, does not purge it of the error. It speaks of a prior conviction, "as above set out," when no such conviction had been "above set out," and concludes with a reference to a conviction "before this indictment was made," when it should have been before the commission of the offense charged in that indictment. It is true that "before this indictment was made" is more favorable to the accused than the language suggested as proper; but the instruction also dealt with other conditions, and when read as a whole is confusing and misleading, and is very far from removing the error pointed out in the instruction first above mentioned.

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In order to obtain a conviction of felony for a second offense in the case at bar, it was necessary for the Commonwealth to prove a conviction of a former offense under the statute, and that the second offense was committed after conviction for the former. This the Commonwealth undertook to do, but the method allowed by the trial court over the objection of the accused was the cause of an exception there, and is assigned as error here. The Commonwealth introduced an order of the trial court adjudging Richard Cooper guilty, "on an indictment for violation of Mapp law (new case)," and sentencing him to pay a fine of $50 and to imprisonment in jail for thirty days. The judgment, however, did not show of what offense under the statute he was convicted, and the prosecuting attorney undertook to supply the deficiency by proof *aliunde*. He proved by the clerk of the court that the indictment for the first offense, under which the conviction was had, was lost. He then undertook to prove the contents of the lost indictment by two witnesses neither of whom purported to have seen, read or heard read the indictment. One of the witnesses, George P. Cridlen, testified as follows: "Q. I will ask you to state, if you remember, upon what charge he was convicted? A. I don't remember the charge in the indictment, but I remember the evidence." This is all of his testimony on the subject. The other witness, J. S. Patterson, testified as follows: "Q. Do you remember what he was charged with? A. Transporting whiskey. Q. Were you a witness? A. Yes. Q. Just tell the jury what evidence you gave in the trial of that case before the jury? A. We had information that there was whiskey in the gap of the mountain toward St. Charles. Mr. Seagraves and I went up there to see if we could find it, and we got Cooper up there with whiskey. We saw a car drive up, and Cooper got out and went down toward the river, and then came back to the car. Seagraves came down one way, and I the other. Cooper stepped up—I

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don't know whether he went in the car or not—I couldn't see, and he threw a bottle, and when I came down he claimed that it was empty. The bottle was broken. He claimed that it was empty, but there was a place about a foot to a foot and one half around that was wet, and I could smell whiskey."

On cross-examination he testified as follows: "Q. I believe you say you don't know what charge the indictment set out? A. No, I don't know. I just remember the court's instructions."

This is all of the evidence offered to prove the contents of the lost indictment. Objection was promptly made by the accused, and exception duly taken to the ruling of the trial court. A motion was also made to set aside the verdict as contrary to the law and the evidence, was overruled, and exception taken.

We are of opinion that the contents of the indictment could not be thus proved. While secondary evidence is admissible to prove the contents of a lost document, or record, the evidence offered in the case at bar does not measure up to the requirements of the law in such cases. Even in a civil suit to establish a lost will, it is said that, "strong and conclusive proof of its former existence, its loss and its contents" is required. *Smith* v. *Lurty*, 108 Va. 799, 800, 2 Va. App. 666, and cases cited; 1 Greenl. Ev. (16th ed. by Wigmore) 161. In a criminal case, the burden is on the Commonwealth to prove every fact essential to the conviction of the accused beyond a reasonable doubt. Not only so, but the facts proved must be established by legitimate evidence. In *Bradshaw's Case*, 16 Gratt. (57 Va.) 507, 518, this court refused to sanction the trial of an accused on a copy of the indictment, remarking that whenever on a trial, the original indictment is substituted by parol proof of its contents, the accused is necessarily exposed to the hazard of being tried and convicted of a charge differing, in a greater or less degree, from that preferred

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by the grand jury. To expose to such a hazard an accused who is nowise responsible for the loss or destruction of the original indictment, seems to me to be hardly in accordance with the spirit that regulates the proceedings in criminal trials."

The holding that where an indictment has been lost one accused of crime cannot be tried on a copy of an indictment duly proved, such for example as a carbon copy, or an examined copy, or a copy otherwise clearly proved by legitimate evidence, is probably against the weight of authority (Beale's Cr. Pl. & Pr., sec. 56, and cases cited; 1 Bish. New Cr. Pro., sec. 1400), but the reasoning of the court is still operative, and it would not be safe to accept such evidence as was received in the case at bar to prove the contents of a lost indictment. The proof of the contents of the lost indictment was an essential part of the Commonwealth's case in order to convict of a felony, and in this it failed. It is conceded that the Commonwealth was proceeding under section 4 of the prohibition act (Acts 1918, p. 579), and was attemping to show that the first offense was in violation of sections 3 and 3-a of the act, but the evidence was insufficient to establish the fact.

For the errors aforesaid the judgment of the circuit court must be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

Reversed.

COTTRELL *v.* COMMONWEALTH.

(*Staunton, September 21, 1922.*)

1. CRIMINAL LAW.—Trial—Continuance—Absence of Witnesses.
2. IDEM.—Evidence—Conspiracy—Threats Made Before Commission of Crime—Attempt to Hire Others to Commit Crime—Hearsay—Harmless Error.

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3. APPEAL AND ERROR.—Assignment of Error—Instructions—Code, sec. 3464.

Error to Circuit Court of Lee county.

Affirmed.

D. F. Kennedy and *Pennington & Pennington,* for the plaintiff in error.

Attorney-General Jno. R. Saunders, Assistant Attorney-General J. D. Hank, Jr., and *Second Assistant Attorney-General Leon M. Bazile,* for the Commonwealth.

WEST, J.:

Ves Cottrell, the accused, who was jointly indicted with Biddle Astrop, Bill Barker, John Blakemore, Rich Cooper and Tom Cornette, for maliciously wounding Charles H. Redman, was convicted by a jury and sentenced to the penitentiary for ten years. The case is here upon a writ of error to that judgment.

1 }

The accused relies on six assignments of error.

First, the court's refusal to continue the case on account of the absence of three witnesses, Dana Gilbert, Frank Wygal and Coy Freeman.

The case was called for trial on the 21st day of September, 1921. The accused moved for a continuance on the ground of the absence of these witnesses, who were alleged to be material. Summonses had been issued for them and two of them had accepted service at Middleboro, Ky., while the third had been summoned by a county constable. The court continued the case to September 30th, at which time, on account of the absence of the same witnesses, the accused moved for a continuance to the next term, on the ground that their testimony was material and that there was no other person by whom the same facts could be proved.

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It appears from the record that these witnesses, while residents of Lee county, were out of the state working for the Louisville & Nashville railroad, but, made frequent visits of a day or two at their homes.

The matter of continuance is left to the sound discretion of the trial court, under all the circumstances of the case, and where that discretion has not been abused and the judgment of the court is not plainly erroneous, this court will decline to disturb its ruling. We will not reverse the judgment of the trial court for refusing to grant a continuance on account of the absence of a material witness unless it is shown that the party complaining has exercised due diligence to secure his presence. *Russell* v. *Commonwealth,* 28 Gratt. 930; *Va. Iron Coal & Coke Co.* v. *Kiser,* 105 Va. 695.

It appears from the record that the witnesses in question were "off and on" in the county, yet, after the case was continued on September 21st to September 30th, no rule was asked for against them, no other summonses were issued for them and no other action was taken on behalf of the accused to insure their attendance, except to go to Kentucky and secure their promise to be present. This was not the exercise of due diligence on the part of the accused and we cannot say that the court plainly erred in refusing to grant him a further continuance. The first assignment is without merit.

2

The second assignment alleges that, "the court erred in admitting the evidence of threats, alleged to have been made some months before the act of the commission of the crime, by Barker, Cornette and Astrop."

It is true, as contended by the accused, that until a conspiracy has been *prima facie* established the declarations of his alleged co-conspiractors, made out of his presence, are not admissible as evidence against the prisoner. The

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evidence against the accused was circumstantial and the Commonwealth proceeded on the theory that a conspiracy existed between him and those jointly indicted with him, to kill Charles H. Redman, who was the prohibition enforcement officer in Lee county.

The threats, evidence of which was objected to, were these: Bob Williams testified that "Bill Barker talked about Redman as though he was meddling in his business, and said he was going to get killed and that there could be a good jack pot made up for his killing." He also testified that "Biddle Astrop said if Redman ever meddled in his business he would kill him;" and that Tom Cornette, who had been convicted and punished for bootlegging on the testimony of Redman, said "if he ever had an opportunity he would match Redman back." Mrs. Williams testified that "Bill Barker warned her that her husband would be killed if he did not quit working with Redman." W. B. McGlamory testified that "Biddle Astrop on Christmas Eve, 1920 said something about 'the St. Charles mob' but made no threat against any particular person." S. L. McLain testified that Biddle Astrop spoke of "shooting hell out of Redman."

We do not deem it necessary to discuss the evidence in detail. It sufficiently appears that the accused and those jointly indicted with him were engaged in the illicit buying and selling of ardent spirits in Lee county, that Redman, in his efforts to break up the violations of the law by them, had incurred their enmity, and that a gun had been provided and a purse made up to pay the man who would kill him, from ambush.

A careful examination of the record convinces us that a *prima facie* case of conspiracy was established, and that the evidence of threats objected to was properly admitted. This assignment is likewise without merit.

The third assignment is based on the action of the court in allowing witness Matt Helan to tell what the witnesses Carl Helan and Jack Catron, then in attendance on the

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court, said with reference to the attempt of the accused to hire these witnesses to kill Redman.

Both Carl Helan and Jack Catron were sworn as witnesses for the Commonwealth and testified that the accused tried to hire them to kill Redman, furnished them with a high powered gun with which to shoot him and promised them $500 each for their services. While technically speaking the testimony of Matt Helan complained of may be regarded as hear-say, yet, under the circumstances, we find no reversible error in the ruling of the court in this matter. To be ground for reversal the error must be material and must be prejudicial to the interest of the party complaining and we are of the opinion the accused was not prejudiced by the testimony complained of.

The fourth assignment relates to the action of the court in permitting Charles H. Redman to testify to the attitude of the accused and his alleged co-conspirators toward him.

In the petition for the writ of error it is stated that the objection which the petitioner makes here is the same made under his second assignment. It follows, for the reasons given in disposing of the second assignment, we find no merit in the fourth assignment.

3 }

The fifth assignment is, "of error in instruction one given for the Commonwealth; error in amending defendant's instructions two and four, and refusing number six offered by the defendant." The petition for the writ of error does not point out or discuss any error in the action of the court in granting or refusing instructions, but merely asks the right to discuss them later, if so desired.

A petition for a writ of error is in the nature of a pleading and must state clearly and distinctly the errors relied on to reverse the judgment.

"To require the appellee or the court to hunt through the record for every conceivable error which the court below may have committed, when none has been pointed out

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by the party complaining of the judgment, would obviously be unreasonable and oppressive on a party recovering judgment, and most burdensome on the court, unnecessarily impeding the progress of business; and, by the confusion and uncertainty which it would beget as to questions on which the case was decided in the court below, destroy its character as an appellate tribunal; and by the multiplicity of the questions for discussion tend much more to confusion and error in its own decisions than the correction of errors which may in fact have occurred in the district court." *Clements* v. *Hearne*, 45 Tex. 415.

The party complaining must "lay his finger on the error." An assignment of error in general terms which requires the appellee or the court to hunt through the record to ascertain what the evidence is that the plaintiff in error considers insufficient to support an instruction, when the plaintiff in error could easily point it out, places a burden upon the court which it ought not to be expected to bear. *Lorillard Co.* v. *Clay*, 127 Va. 748; *Bank* v. *Triggs Co.*, 106 Va. 327; *Wormley* v. *Mathieson Alkali Works*, 119 Va. 862; *Rust* v. *Reid*, 124 Va. 1; *Deitz* v. *High*, 131 Va. 7, 24 Va. App. 28; *So. Ry. Co.* v. *Cheshire*, 109 Va. 741.

It follows that the errors, if any, committed by the court in granting and refusing instructions are not sufficiently assigned under section 3464 of the Code to require consideration by this court.

The only remaining error assigned is the refusal of the trial court to set aside the verdict as contrary to the law and the evidence.

The evidence on behalf of the Commonwealth is largely circumstantial.

Charles H. Redman was a county policeman charged with the enforcement of the prohibition law in Lee county. On August 2, 1921, he was engaged in running down violators of this law. Returning to his home about 11:30 a. m. he took off his gun and made himself comfortable and laid

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down in a folding chair on his porch, with his feet higher than his head. In less than thirty minutes he was shot from ambush. The ball, a steel jacketed cartridge, entered the lower juncture of his leg and passed up the leg and near his ribs and lodged in his shoulder. The shot came from a bluff, partly covered with bushes, located in front of the house, and an examination of the place from which the shot was fired showed that some one had eaten a lunch there. Just after the report of the rifle Redman saw a man, about the size of the accused, running in the woods about forty yards from the bluff.

Accused looked at a gun Charley Hayburn had for sale, about two weeks before Redman was shot. On the day before the shooting he purchased the gun and about thirty steel jacketed cartridges. He came to Hayburn's place about dark and had him bring the gun out to the road, and after he bought the gun he asked Hayburn to "say nothing about it."

Accused was seen by Amos Jones about 3:30 o'clock in the afternoon of the day of the shooting crossing a hollow in the woods about three quarters of a mile from Redman's house, and across the ridge from the house. He motioned Jones to come to him. When he approached him, accused had a high power gun under his arm and a pistol in his pocket and said he took Jones to be his friend and asked Jones if he knew that Reman was shot. He told Jones he had not had any water all day and was very thirsty and requested Jones to get John Blakemore's car to come after him and to tell Blakemore he could find him in a certain nearby corn field. Accused told Jones he would rather not go home for a few days as it would be "suspicioned on him" that he killed Redman, and stated that he was going to Middlesboro, Ky., for three or four days. Jones delivered the message to John Blakemore at Pennington Gap and the car left at once. Blakemore returned with a man in

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the car, arriving at Pennington Gap just after the train had passed.

Deputy Sheriff Stacy, upon receiving information of the shooting and the probable whereabouts of the accused left for Pennington Gap. On the way, after daylight, they saw two men standing by the roadside whom they took to be John Blakemore and the accused, and when he and those with him came within fifteen steps of the car they heard voices which they took to be the voices of Blakemore and the accused. The two men entered the car and drove towards Pennington Gap. The deputy and his assistants went to Pennington Gap. Not finding the accused there they went by Dry Branch, then to Black Mountain, and later to Rose Hill. They arrested John Blakemore, Ves Cottrell's son, Tom Cornette and Bill Barker about 8 a. m. the next day at Pennington Gap and examined a car in the possession of Cornette and Barker and found it wet and muddy with clay mud, noticing at the same time the tread of the car. On the way to Rose Hill, they traced the track of the same kind of tread up to a hillside near Rose Hill, where it was evident the car got stuck in the red mud and turned and came back. They saw a place where it looked like one man had gotten out of the car and walked on toward Rose Hill.

The accused was seen by Chas. Crockett in Rose Hill early in the morning of the day after the shooting. He purchased a shirt and tie from N. M. Rowlett and put them on before leaving the store, and soon thereafter was arrested, just before the train, which would have taken him out of the State passed Rose Hill. When arrested he stated that he was in Middlesboro, Ky., the day Redman was shot.

Accused told Amos Jones that Alex Ely, one of the assistants of the deputy sheriff, while hunting for the accused, walked up and took a seat on a fence in fifteen feet of him and sat there about an hour, and that if Ely had turned his head he would have killed him.

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Redman, previous to the shooting, had arrested the accused for being drunk, having whiskey in his possession and for shooting up the town of Pennington Gap. About a month before Redman was shot accused told Robert Harris there was "a fellow we had to get rid of," and, upon being asked who it was, the accused said it was Charles H. Redman, and added that there was $300. for the man who would kill him; that "the guns had been appropriated for the business;" and that one of the guns was a 38 special and the other a high power gun. The accused also told Harris that "a man could go on the hill at St. Charles and do it off the hill," the hill referred to being the one from which Redman was afterwards shot. During the conversation Carl Helan came up and the accused asked him about committing the crime, and Helan said he had gotten out of the notion. Accused stated to Harris that Jack Catron and Carl Helan intended to kill Redman but had backed out. Accused then offered Harris and Carl Helan $300 if they would kill him and advised them to go up in the bushes in front of Redman's house. Three weeks before the shooting the accused offered Carl Helan and Jack Catron $500 to kill Redman and gave them the guns, which the accused had sent to Matt Helan's house, one being a high power and the other a 38 special. They started down the railroad track to commit the crime. After going about a half mile they met Matt Helan and told him what they were about to do, and, upon his advice, turned and went back. Accused told Jack Catron there was a good place on the right hand side of the road at St. Charles, that there were some bushes and a hollow there, and that Catron could commit the crime from the hollow, or from the cliff opposite Redman's house, from which Redman was afterwards shot. Accused told Matt Helan that he intended to kill Redman.

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The foregoing are among the material facts and circumstances appearing from the evidence introduced on behalf of the Commonwealth.

The accused based his defense upon an alibi and introduced witnesses who testified that he was in Middlesboro, Kentucky, the day of the shooting. Other witnesses were sworn for the purpose of impeaching the witnesses for the Commonwealth. Upon the conflicting evidence thus presented the jury found the accused guilty. There was evidence to support their verdict and under familiar principles we are not authorized to disturb it.

We find no error in the judgment complained of and it will be affirmed.

Affirmed.

CREWS v. SULLIVAN.

(*Staunton, September 21, 1922.*)

1. REAL ESTATE AGENTS.—Commissions—Sale—Terms—Contracts—Offer and Acceptance—Withdrawal of Offer—Time for Acceptance.

Error to Circuit Court of Montgomery county.

Reversed.

V. M. Sowder and *R. L. Jordan*, for the plaintiff in error.
Harless & Colhoun, for the defendant in error.

WEST, J.:

G. A. Sullivan, hereafter called the plaintiff, recovered a judgment against C. J. Crews, hereafter called the defendant, for $400, with interest from November 1, 1920, and costs. The case is here upon a writ of error to that judgment.

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On August 16, 1920, C. J. Crews placed his house and lot, in the city of Radford, in the hands of G. A. Sullivan, a real estate agent, for sale. The contract was in writing and the terms of sale therein stated were: "Price, $8,000; on easy terms. Will pay five per cent commissions, if you make sale."

On September 1, 1920, Sullivan, signing as agent for C. J. Crews, entered into a written contract with R. H. Moore and wife by which he undertook to sell the property to them for $8,000—$2,500 cash and the balence of $5,500 to be paid at the rate of $600 annually, with interest. On September 3, 1920, when Sullivan informed him of the terms of the contract with Moore and wife, Crews declined to accept them, and on September 20th wrote Sullivan he would not accept the terms, made in his absence. On September 21, 1920, he wrote R. H. Moore that he could not accept the nine-year terms and would not accept over five years of equal installments, and requested him to let him know *at once* whether he wanted the property on five, instead of nine, deferred payments. Moore thereupon placed the matter in the hands of his attorneys, Messrs. Harless and Colhoun, and on October 6th they wrote Crews, referring to the contract between Sullivan and Crews, and asking him what he considered "reasonable terms." Crews replied on October 11th, stating that, as an offer of compromise to prevent any further misunderstanding, he was willing to convey the property to Moore and wife for the cash payment mentioned and deferred payments in equal installments of one, two and three years, with interest from date of sale, secured by deed of trust on the property and insurance on the buildings; adding that the terms of one, two and three years were "easy and reasonable." On October 1st, Sullivan tendered Crews a check for the $2,500 under the contract of September 1, 1920, which was refused. On October 13, 1920, Messrs. Harless & Colhoun wrote Crews, referring to his letter of September 21st to

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Moore, and stated that Moore and wife were then willing to accept the five-year proposition, but if they had to sue they would insist upon the terms as agreed upon by his agent, and asked whether this, their final offer, would be accepted.

The defendant relies on a number of assignments of error, but, in our view of the case, it will be necessary to consider only the eighth assignment, which relates to the refusal of the court to set aside the verdict of the jury.

A real estate agent is defined to be one who negotiates the sale of real estate. Generally, his duty is only to find a purchaser who is ready, willing and able to take the property at the price and upon the terms fixed by the owner. He has no *implied* authority to fix the terms of sale, or to sign a contract of sale on behalf of his principal. *Halsey* v. *Monteiro*, 92 Va. 583; *Davis* v. *Gordon*, 85 Va. 559; *Kramer* v. *Blair*, 88 Va. 456; *Duffy* v. *Hobson*, 40 Cal. 240; *Force* v. *Dutcher*, 18 N. J. Eq. 401.

The contract of August 16, 1920, contains no provision expressly authorizing Sullivan to fix the terms of sale or to enter into any contract of sale not approved by Crews. As soon as Sullivan informed Crews of the terms of the sale, upon which he had undertaken to sell the property to Moore and wife, he refused to approve them and so informed Sullivan and Moore.

A real estate agent can sell only upon terms fixed by his principal, and unless he can show that he has completed his undertaking according to its terms, or that its completion was prevented without his fault by his principal at a time or under circumstances when the latter had no right to interfere, he is not entitled to compensation. *Caldwell* v. *Tannehill*, 117 Va. 11, 10 Va. App. 131; Mechem on Agency, sec. 2427.

The record fails to disclose any improper conduct in this respect on the part of C. J. Crews. In his letter to R. H. Moore, dated September 21, 1920, Crews says: "I am noti-

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fying you that I cannot accept the nine years' terms. Will not accept over five years of equal installments. I told Mr. Sullivan this on my return to the city. He had no authority to make such long terms. Let me know *at* once if you will come to those terms." The plaintiff contends that the acceptance of the five-year terms by him, contained in the letter of his attorneys, Messrs. Harless & Colhoun, to C. J. Crews, dated October 13, 1920, entitled him to recover his commissions.

It is settled law that an offer may be withdrawn at any time before acceptance. A proposition must be accepted before it is withdrawn or it becomes inoperative. There must be no variance between the acceptance and the offer. Accordingly, a proposal to accept, upon terms varying from those offered is a rejection of the offer and puts an end to the negotiation, unless the party who made the original offer renews it or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. Having, in effect, rejected the offer by his conditional acceptance, the offeree cannot subsequently bind the offeror by an unconditional acceptance. 6 R. C. L., p. 608, sec. 31; *Baird* v. *Pratt*, 148 Fed. 285; *Maclay* v. *Harvey*, 90 Ill. 525; *Egger* v. *Nesbit*, 122 Mo. 667; *Hutchinson* v. *Bowker*, 5 M. & W. 535; *Hyde* v. *Wrench*, 3 Beav. 336.

Where an offer is made without any limitations as to time, unless accepted within a reasonable time, the law presumes it to be withdrawn, and a subsequent acceptance will impose no obligation on the proposer, although he has done no act and given no notice of its withdrawal. 6 R. C. L., p. 610, sec. 32; *Ferrier* v. *Stover*, 63 Ia. 484, 19 N. W. 288.

If, to the acceptance of the proposal of a vendor, a condition be affixed by the party to whom the offer is made, or any modification or change in the offer be made or requested, this will constitute a rejection of the offer. 6 R. C. L., p. 608, sec. 31; *Weaver* v. *Burr*, 31 W. Va. 736; *Ins.*

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Co. v. *Carrington,* 3 Conn. 357; *Railroad Co.* v. *Bartlett,* 3 Cush. 225; *Four Oil Co.* v. *United Oil Producers,* 145 Cal. 623.

The letter of September 21, 1920, requested that Moore let Crews know at once whether he would come to the five-year terms. To this letter, Moore makes no reply, but, on October 6th, his attorneys write Crews, saying they are not authorized to vary the terms of the purchase, but, in case Crews is disposed to meet their clients on an equitable basis, they are inclined to advise them to make some concessions in order that the deal may be closed at an early date. The plaintiff testified that when he tendered the check for $2,500 to defendant on October 1st, he was claiming under the original contract, which provided for a credit of nine and one-half years. Having the five-year offer then in hand, the language of the letter of October 6th, fairly construed, and the conduct of Sullivan in insisting on the nine and a half years' time, constituted a rejection of the five-year offer.

On October 11th, Messrs. Harless & Colhoun wrote Crews, asking for an answer to their letter of October 6th, and the same day Crews replied to the letter of October 6th, saying he was willing to accept the cash payment and the balance in three equal payments of one, two and three years, with interest. This letter, fairly construed, was a withdrawal of the five-year proposition. On October 13th Messrs. Harless & Colhoun wrote Crews that Moore was willing to accept the five-year proposition. This acceptance came too late, since a party cannot accept an offer which has been withdrawn or which he has already rejected.

The words, "easy terms," contained in the contract of August 16th are absolutely indefinite, and left the terms of the sale open for the approval of the owner. While it is true Sullivan was the special agent for Crews to sell the property in question, there is nothing in the evidence to

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warrant the jury in holding that Sullivan, as such agent, was vested with the authority to fix the terms of sale, without regard to the wishes of Crews. It is true the plaintiff testified that when he told Crews Moore was offering $2,500 cash and wanted good terms on the balance, Crews said: "I am not particular about the balance," but this language is not sufficiently definite to bind Crews to accept any terms of sale which Sullivan might see fit to name.

The doctrine announced in *Smith* v. *Tate*, 82 Va. 664, relied on by the plaintiff, that, being constituted agent and authorized to make the sale, he had authority to execute the agreement of sale to the purchaser, upon the theory that authority to sell implies an authority to do anything necessary to complete the sale and make it binding, has no application in a case where the owner has not named the terms of sale, which were accepted before withdrawal, or authorized the agent to name them for him.

Mutuality of obligation is essential to the validity of a contract, and it is not binding upon either party until the minds of the parties meet on one and the same set of terms. This was never done in the instant case.

For the foregoing reasons, we are of opinion that the evidence fails to establish a case which entitled the plaintiff to recover. This conclusion makes it unnecessary to consider the other assignments of error since they could not affect the result.

The verdict of the jury must be set aside and the judgment reversed, but a new trial will not be granted. Having no reason to believe that, on another trial, new or different evidence might be introduced which ought to affect the result, we shall dispose of the case under section 6365 of the Code and enter final judgment for the defendant.

Reversed and final judgment.

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DICKERSON, ET AL., v. DICKERSON.

(*Staunton, September 21, 1922.*)

1. DEEDS.—Construction—Life Estate—Remainder—Right to Occupy Premises.

Appeal from Circuit Court of Floyd county.

Affirmed.

Proffitt & Weeks and *Harless & Colhoun*, for the appellants.

J. E. Burwell and *V. M. Sowder*, for the appellee.

BURKS, J.:

The object of this suit was to obtain the proper construction of a deed made by Coffee Dickerson in 1898 to his wife and seven of his ten children. So much of that deed as is involved in the controversy is in the following words and figures, to-wit:

"This deed, made the 20th day of December, 1898, between Coffee Dickerson, of the first part, and Catherine Dickerson, the wife of Coffee Dickerson, and Rhoda Dickerson, Malera Dickerson, Elizabeth Dickerson, Cornelius Dickerson, Peter Dickerson, Walter Dickerson and Posey Dickerson, children of said Coffee Dickerson and Catherine Dickerson:

"Witnesseth: That the said Coffee Dickerson, for and in consideration of the natural love and affection which he has for his said wife and children, and desiring to secure a home for them after his death, hereby grant and convey unto the said Catherine Dickerson, Rhoda Dickerson, Malera Dickerson, Cornelius Dickerson, Peter Dickerson, Walter Dickerson and Posey Dickerson and Elizabeth Dickerson, preserving a life estate for himself and full control, management and occupation during his lifetime, that tract of land upon which he, the said Coffee Dickerson and fam-

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ily, now reside, lying in Floyd county, on the west fork of Little River, containing about 130 acres, and is the same tract of land conveyed to the said Coffee Dickerson by Moses Dickerson, by deed dated 30th day of January, 1869, and recorded in deed book L, page 617, in the clerk's office of the county court of Floyd county to which deed reference is hereby made for a more particular description of said land. After the death of said Coffee Dickerson, the said parties of the second part are to have, hold and occupy said land during their natural lives and the lives of the survivors of them, and at the death of all of said parties of the second part the land is to go to the heirs at law of all of said seven children. This deed is made in lieu of dower to the said Catherine Dickerson, should she survive her husband, the said Coffee Dickerson, in any and all his real estate owned by the said Coffee Dickerson, and is further for the full share and interest of all the seven children of the said Coffee Dickerson that they might have in any other lands owned by said Coffee Dickerson at his death and as to which he may die intestate. This land is to be a home for any or all of the parties of the second part who may choose to live on same, and in case any of them should leave the place and go elsewhere to live they are not to share in or have any of the products of said land while so living away, but those of them who remain and live on the place are to use the same for themselves, and those who use and occupy the land shall pay all taxes assessed on same, but none of the parties are to in any way have the right to use or control said land during the lifetime of the said Coffee Dickerson; he, as aforesaid, reserves for himself full and complete control and ownership during his lifetime. And the said Coffee Dickerson reserves the further right, that in case any of said children die before he does, to dispose of the interest, of any so dying, in said land either by deed or will."

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At the time this deed was made, Coffee Dickerson owned other lands besides the one hundred and thirty acres conveyed as aforesaid, and had three other children who had married and left the parental home, and these three inherited said other lands. The seven children mentioned in the deed were not married and still constituted members of the grantor's family. Coffee Dickerson died in 1898, and his widow died in 1910. Four of the seven children provided for in the deed died, unmarried and without issue, prior to the institution of this suit, leaving surviving them Elizabeth, sometimes called Bettie, who the complainant in the court below, and is appellee in this court, and her two brothers, Peter Dickerson and Walter Dickerson, the appellants. Peter Dickerson continued to live at the old home until October, 1901, when he married and went off and made a home for himself. He now lives in a good house on his farm supplied with acetylene gas, and with water and other modern conveniences. He has recently gone back to the old home tract and erected thereon a small cabin, or shack, in which he and his boy sleep, with a view of claiming a present share in the 130-acre tract, but his claim is so utterly without merit that it need not be further noticed. Walter Dickerson married in June, 1902, and immediately went west to live, and remained there two years. He then returned and went upon a part of the old homestead and built a dwelling house of five rooms and began the cultivation of the farm, paying to his mother, during her lifetime, and, after her death, to his sister, Bettie, a part of the crops as rent. In 1917 his brother, Posey, one of the grantees in the deed, joined the army and entered into a written contract with Walter by which the latter was given immediate possession of the tract of 116 acres of land belonging to Posey, and for which Posey had paid $5,200. Walter was to pay the taxes, keep up the fences and cultivate the land in such manner as he deemed best, and to have all the proceeds, and, in the event that Posey never returned home,

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the farm was to be the property of Walter. The farm had upon it a good dwelling house and furniture therein. Posey never returned to claim the farm, and died in February, 1919, leaving Walter the owner in *fee* of the farm. Soon after this contract was entered into, Walter moved his family and effects to the 116-acre farm, known as the Howard place, and remained there for two years. He left some portion of his furniture in his former home and occasionally slept there, but the evidence indicates a *bona fide* removal as a home. He has a wife and six children. In 1919 he moved back into the house he had built and formerly occupied on the 130 acre tract for no other purpose than to claim present rights under the Coffee Dickerson deed, and to graze and cultivate the farm. When asked if his object in moving back was to get the use of the place, he said, "Yes, to exercise and hold my rights under the deed." His brother Posey not only left him the house and farm, but also one-half of his Government insurance. It seems, however, that he was short of pasturage and could not rent any, and that one of the chief reasons for returning was to secure needed pasturage.

The rules for the construction of wills, deeds and other written instruments have been stated so often and so recently as not to need repetition. See *Temple* v. *Wright*, 94 Va. 340; *White* v. *Old*, 113 Va. 709, 6 Va. App. 468; *Conrad* v. *Conrad*, 123 Va. 716, 16 Va. App. 613.

In 1898, when the deed was made, there was a single dwelling house on the land granted, and in it there dwelt a father and mother, and their seven unmarried children. This was their home. It was no longer the home of the three who had married and left the parental homestead. It was natural to suppose that some, at least, of the remaining seven would do likewise, but some might not. The grantor evidently desired especially to provide for the latter. The expressed object of the deed was "to secure a home" for his widow and unmarried children. The grantor

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sought to establish a home for the otherwise homeless, just as his home on that tract of land then was. A haven of rest from the troubles of life, a place where there would be mutual love and sympathy, and they could enjoy the pleasures of social life. It was to be the permanent abode of those who elected to make it so, with the right of those who had not abandoned it to return at pleasure and enjoy the privileges granted by the deed. But the privilege was not extended beyond this. It did not extend to a partition of the farm, nor to the rearing of several distinct families in the same home. Neither did it extend to the management or control by any one or more of the grantees to the exclusion of others. The tract of land was granted as a unit, and the home was established as a unit. The farm was to be one home, for one family and that family was to be composed of such of the grantees—not their wives and children—as might choose to live on the place, and not go elsewhere to live. The fact that the grantor excluded his married children from the grant is some evidence of when this home privilege was to cease as to the grantees. He was not making provision for the families of the grantees. If the seven grantees all married it was not practical that there should be seven families reared in the one house. It must have been intended that as each of the seven children married and moved off the place, he or she, with his or her consort, would constitute a new family unit, with a new and independent home of their own, and with no right to return to the family homestead provided by the deed. It is said, however, that effect must be given to every word and clause of the deed, and that the deed declares that if any of them should leave the place and go elsewhere to live, they are not to share in or have any of the products of said land, while so living away, and that this is a grant of the right to return. The grant of the right to live on the place and of the right to return was a personal right of the grantees only, and was not extended

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to the wives and children of the grantees. It is not to be presumed that the grantor intended to offer any inducement to one of his children who had established a home of his own elsewhere, to desert his or her consort and children, to break up his or her home, merely to share in his benefaction. The provision will be construed rather to apply to some prodigal, who may have gone "elsewhere to live," without establishing a home for others, and who, on account of misfortune, or necessity, or a mere longing for home and its comforts, wishes to return. Such a construction gives effect to every word and clause of the deed and seems most consonant with the intent of the grantor.

The appellee, Elizabeth Dickerson, is the only one of the grantees who measures up to the requirements of the deed. She has lived on the place as a home continuously since the death of her father and is still living there. The claim of Peter Dickerson, after an absence from the place of twenty years, of the right to return to the farm and erect a separate dwelling thereon and to share the profits to be derived therefrom, is frivolous. Walter Dickerson married in June, 1902, and moved off the farm and went West and lived for two years, returning in the fall of 1904. He then built a house on the farm and lived there till 1917, when he removed his family to the Howard place given him by his brother, Posey. This place has a good dwelling house on it. Here he remained for two years, but returned in 1919, for the avowed purpose of exercising and holding his rights under the deed. He had no rights under the deed to partition the farm, nor to bring his wife and six children to live in the home of his sister provided by the deed, nor to take from her, or interfere with, her management of the farm. The trial court was of opinion that "Elizabeth Dickerson is the only one of the grantees named in the deed from Coffee Dickerson, dated the 20th day of December, 1898, a copy of which is filed with the bill of complaint, who has complied with the conditions of the said deed, and

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that she is entitled to have the place described in said deed as a unit, so long as she continues to comply with the conditions of the same, but not to commit waste, and that she is entitled to enjoy the said place without let or hindrance of the defendants, and that neither Peter nor Walter have complied with the terms of said deed and do not live or have a home on said place."

This opinion overlooks the fact that Peter and Walter Dickerson, or one of them, may become homeless in the future, in which event each, upon becoming homeless, would have the right under the terms of the deed from Coffee Dickerson, of December 20, 1898, to return and take his place in the home on the land conveyed by said deed, and enjoy the rights and privileges thereby conferred.

The decree of the trial court will, therefore, be so amended as to provide for that contingency, and, as amended, it will be affirmed.

Amended and affirmed.

EDWARDS' ADMINISTRATOR v. LAUREL BRANCH COAL COMPANY.

(*Staunton, September 21, 1922.*)

1. MINES AND MINING.—Negligence—Duty to Warn and Instruct Employees—Unusual and Extraordinary Dangers—Experienced and Inexperienced Miners—Code, sec. 1840—Evidence.
2. PLEADING AND PRACTICE.— Grounds of Defense — Contributory Negligence—Code, sec.
3. MINES AND MINING.—Duty of Employer to Instruct Inexperienced Miner—Knowledge of Inexperience—Burden of Proof—Instructions—Evidence—Duty of Inspection — Unsafe Condition—Knowledge by Miner—Understanding of Instructions—Mental Capacity of Employee—Safe and Unsafe Methods of Doing Work — Contributory Negligence — Evidence — Violation of Statute—Negligence—Proximate Cause—Fellow-Servants.
4. IDEM.—Liability Insurance—Evidence.

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Error to Circuit Court of Dickenson county.

Affirmed.

S. H. & Geo. C. Sutherland, for the plaintiff in error.
Chase & McCoy, for the defendant in error.

KELLY, P.:

J. P. Edwards, while at work in a mine operated by the Laurel Branch Coal Company, was accidentally killed by coal which fell in on him either from the side or the top of the mine. In this action by his administrator for damages, there was a verdict for the company, upon which the court entered the judgment under review.

1 }

The declaration alleges at great length a number of breaches of duty on the part of the defendant, but in the light of the evidence the only material allegations are those which charge that the plaintiff's decedent was an inexperienced miner, unacquainted with the ordinary dangers incident to mining coal, and also unfamiliar with certain unusual and extraordinary dangers peculiar to such work in the company's mine and known to it, and that the company failed to comply with its legal duty in warning and instructing him. The other alleged breaches of duty may be disregarded. The particular danger which resulted in the decedent's death developed in the course of work which he could constantly observe as it progressed, and which in a sense he was helping to perform. As stated in the brief of plaintiff's counsel, the danger was such as that "an experienced miner would have known it at a glance." If he was an experienced miner, and was properly informed of any unusual dangers, the injury could not have happened to him without such carelessness on his part as would have barred any right of recovery, upon familiar and well settled principles. See *Addington* v. *Guests River Coal Co.*, 130 Va. 584, 23 Va. App. 549.

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The accident occurred in July, 1918. The duties of the defendant to warn and instruct the employees in its mine, whether such employees were experienced or inexperienced, are defined by statute. Acts 1912, chapter 178, section 6, p. 421; Code 1919, sec. 1840. These statutory duties are somewhat fully discussed in *Clinchfield Coal Corporation* v. *Hawkins*, 130 Va. 698, 23 Va. App. 646. As specifically stated in the statute they are as follows:

"It shall be the duty of the mine foreman or assistant mine foreman of every coal mine in this State to see that every person employed to work in such mine shall, before beginning to work therein, be instructed as to any unusual or extraordinary dangers incident to the work in such mine, which may be known to or could reasonably be foreseen by the mine foreman or assistant mine foreman. * * *.

"Every inexperienced person so employed shall work under the direction of the mine foreman, his assistant, or such other experienced worker as may be designated by the mine foreman or assistant until he has had reasonable opportunity to become familiar with the ordinary dangers incident to his work."

The plaintiff's decedent was about twenty-three years of age and was well developed physically, although not entirely robust. He was a good and capable worker, and had saved some money from his wages as a laborer on a farm and on public works, but had no experience as a miner prior to his employment in the defendant's mine. He had been engaged there for about two weeks before his death. In point of intelligence he was probably slightly under the average, and he had a serious impedient in his speech rendering it difficult for him to be understood by other persons, but the evidence as a whole does not warrant a fair inference that the defendant ought to have regarded him as mentally deficient. He had for some time been working on his own account, sometimes at home, sometimes away from home, with his father's approval and consent. When

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the accident occurred he was working with his older brother, John Edwards, who had been a miner for about a year, but in the defendant's mine for only about five weeks. This brother was doing what is called contract work, mining coal and loading the same into mine cars at a certain price per car. The decedent was employed to assist in loading the coal mined by John Edwards, with and under whom he constantly worked. There is a contention on behalf of the defendant that the decedent was an employee of his brother and not of the company, but the evidence shows conclusively that he was working for and paid by it, although the payment for his work and that of his brother was made to the latter and then divided between them in an agreed proportion.

Some of the evidence tended to show that there are dangers incident to mining for the defendant not usual in other neighboring mines. For example, one witness stated that "this coal at this place in the Widow Kennedy (referring to the name by which the seam of coal in the defendant's mine was known) is all broken, and is deposited in slips, and slides, and pieces of all sorts of shapes and placed in all sort of positions, and very often is not clean, but has dirt in it. An experienced miner can detect where these slips or slides are in this coal both by sounding it, and by the sight. You can see the crevices or seams where the water has run through it and colored it. The only way that I know how to make the place safe where these slips are is to take them down. That is what I always do when I find them."

John Edwards testified that he had begun to notice some difference in the Widow Kennedy seam as compared with other coal with which he was familiar but had not discovered that it was more dangerous than the coal in other mines until after the accident. He undertook to explain his lack of experience and his inability to appreciate the peculiar dangers in the defendant's mine by saying that,

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while he had been a miner for about a year, the previous mining which he had observed and participated in was carried on by machinery which cut the coal down, and that he had never worked before in "solid coal like that." He further testified as follows: "It (the coal) was sitting in all kinds of slips and every kind of way nearly that could be thought of! setting in all kinds of shapes, slipping and sliding every way, and it was wet. An experienced miner can tell where these slips are. I have learned that since."

John Edwards and Dave Edwards, (the latter being another brother who worked with John and Josh Edwards) both testified that neither of the three were ever warned or instructed as to the peculiar dangers in the Widow Kennedy seam, and that no instructions of any kind were given to the decedent by the mine foreman or his assistant.

The coal was ten or eleven feet high where the accident occurred. The plaintiff's decedent and his brother, John Edwards, were loading a coal car, the former standing on the left and the latter on the right of the mine track, when the coal fell on the decedent. The plaintiff contends this coal slipped out of what we may call a pocket from the right rib or side wall of the mine, while the defendant, on the other hand, contends that it came from the top and upper side of the rib and consisted of a corner of loose coal which had been left hanging up there in the course of the work carried on by John Edwards and his helpers. There was evidence tending to support each of these contentions. It is shown without contradiction or dispute, however, that whether the coal which fell came from the right side or from the right corner at the top, John Edwards had bored a hole in it and tried to shoot it down just before he and his brothers quit work on the evening before the accident. The shot for some reason was not effective and "blew out" without bringing the coal down. John Edwards testified that he drove the hole straight into the rib with a view of turning off a new room. The defendant's testimony tends

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to show that he put the hole in the alleged over-hanging corner so as to loosen and bring it down. In either event, one of the purposes in firing the shot was to get more coal to load into the cars.

John Edwards and his brothers left the mine that evening without going back to see the result of the shot. Dave Edwards for some reason quit the employment of the company that night, and did not thereafter return. When John Edwards and the decedent returned to work the next morning they found that the shot had blown out, and before going to work John Edwards inserted a ten foot steel bar in the hole to see if the coal was loose, but he was unable to prize it down. There was other coal which had previously been shot down from the heading just in front of where the hole had been made and fired, and it was this coal which John and Josh Edwards were loading into the car when the accident happened.

There was evidence to the effect that John Edwards and Josh Edwards had been specifically warned either by the mine foreman or his assistant on the evening before that the coal which fell ought to be brought down before they worked under or near it. This evidence is in conflict with certain other evidence for the plaintiff.

1. The first assignment of error is that the court refused the plaintiff's motion to require the defendant to make more specific its ground of defense in respect to the alleged assumption of the risk by the plaintiff's decedent. We do not find from the record that any such motion was ever made by counsel or acted upon by the court.

2. The defendant was required, on motion of the plaintiff, to file grounds of defense, and among them was this: "Contributory negligence of plaintiff's intestate, Joshua Edwards, causing his injuries." Thereupon the plaintiff moved the court to require the defendant "to plead said contributory negligence as required by the statute," and the

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defendant then filed the following so-called "plea of contributory negligence;"

"(1) That the coal which fell on Joshua Edwards was a top coal hanging over the right rib in said mine, which had been undercut by said Joshua Edwards.

"(2) That the said John Edwards and Joshua Edwards were notified to take down this overhanging coal and they, the said John Edwards and Joshua Edwards, the said Joshua Edwards being a servant of and working for the said John Edwards, put a shot or blast in said coal causing the same to become loose, and instead of pulling down said overhanging loose coal, they with knowledge of the danger, having been warned, and also the danger was so apparent the defendant, by the exercise of ordinary care, would have known same, the said John Edwards and Joshua Edwards carelessly, negligently and without any regard for their own safety started work shoveling coal underneath said loose overhanging coal, thereby making it weaker, causing said coal to become weaker and looser by reason of the negligent acts aforesaid, and fall on the said Joshua Edwards. These negligent acts aforesaid, of Joshua Edwards, were the cause of the injury to the said Joshua Edwards. The said coal which was overhanging owing to the work aforesaid, and the negligent acts aforesaid, and was so situated that same could not be propped.

"And whereas for the many reasons above stated the injury to the said John Edwards, was due solely to his own gross and contributory negligence and the defendants ask that this suit be dismissed."

The order of the court entered at the time the foregoing paper was filed shows that it was objected to "because as prepared it did not show contributory negligence, but that the plaintiff was the sole party guilty of negligence;" and the bill of exceptions signed more than a year later certifies that the objection was "because the same was not specific enough," and that the plaintiff "thereupon moved the court

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to strike the same from the record because not specific enough and because the same did not conform and measure up to the requirements of the statute, requiring such defense to be specifically pleaded."

Reading these two parts of the record together, and considering them in the light of the plaintiff's brief which accompanies and explains the assignments of error, it appears that the assignment here under consideration presents two objections to the so-called plea—first, that it was not sufficiently specific to meet the requirements of the statute, and, second, that it failed to show the defendant's primary negligence.

Neither of the objections is good. As to the first, a mere reading of the specifications will show that they meet any but the most hypocritical test in giving the plaintiff notice of the contributory negligence relied on by the defendant. As to the second objection, the statute was not intended to compel a confession of the defendant's primary negligence as a condition precedent to reliance upon the plaintiff's contributory negligence. To be sure, the question of contributory negligence cannot arise until the negligence of the defendant has been established, but it has always been true, and is still true, that a defendant may at one and the same time claim that the plaintiff has no right to recover because he has failed to prove negligence on the part of the defendant, and, in the alternative, that even if the defendant was guilty of negligence, the plaintiff cannot recover because his own wrongful conduct efficiently contributed to the injury. The only purpose of the statute was to require the defense of contributory negligence to be set out in advance of the trial in such way as to give the plaintiff reasonable notice of the character of proof which it would have to meet and overcome in combatting such defense.

3. The next assignment is that the court ought to have set aside the verdict as contrary to the law and the evidence.

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From what has already been said in the statement of the evidence, it is clear that the case is one which depended upon the weight and credibility of testimony. We cannot say that the verdict was contrary to the law or the evidence. The jury evidently credited the evidence of the defendant, and in that view of the case the verdict was clearly in accord not only with the evidence but with the law.

3

4. Many complaints are made as to the ruling of the court upon the instructions.

(a) Instruction No. 1 asked for by the plaintiff, so far as material here, is set out below, except that the court interlined the italicized words appearing therein:

"The court tells the jury that if they believe from a preponderance of the evidence in this case, the deceased, J. P. Edwards, was inexperienced in working in coal mines then it was the duty of the defendant, *if it knew, or could have known by inquiry of his inexperience,* to only allow him to work under the direction of the mine foreman, the assitant mine foreman, or such other experienced miner as was designated by the mine foreman until the deceased had a reasonable opportunity to become familiar with the ordinary dangers incident to the work to which he was assigned."

It is insisted that the italicized language was erroneously inserted, because it placed an unwarranted limitation on the provisions of the mining act, as now found in section 1840 of the Code of 1919, set out above. In other words, the contention here made is that knowledge on the part of an employer of the inexperience of an employee is, under the terms of the statute, immaterial, regardless of any diligence on the part of the employee to ascertain the facts in that regard. This is not in accord with our view. The statute in question merely changed the common law with respect to instructing inexperienced miners so as to provide a practicable and effective method of imparting the

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necessary instruction. *Hawkins* v. *Clinchfield Coal Corporation,* 130 Va. 698, 704, 23 Va. App. 646. The common law rule is that when a person seeks employment in any particular department of labor, he thereby represents himself to possess the necessary experience and learning. 3 Lab. M. & S., sec. 1168, p. 3107; *Wagner* v. *H. W. Jayne Chemical Co.,* 147 Pa. 475, 30 Am. St. Rep. 745. This rule has not been changed by our statute and the burden is, as heretofore, on the plaintiff to show that the employer knew, or ought to have known, of the unfitness and inexperience of an adult and apparently intelligent employee who has voluntarily sought the particular employment in which he has engaged.

In this particular case there was evidence tending to show that the decedent, although employed through the agency of his brother, was solicited by the latter to come to work at the request of a duly authorized representative of the defendant. If this was true, then the presumption of inexperience, according to some authorities, did not arise, and it might in that event have been the duty of the defendant to exercise due care to inform itself reliably upon the subject. But in any view of the question here under consideration, we see no valid ground upon which the plaintiff, in the light of the evidence, could object to the language used by the court in the foregoing instruction. It is not denied that Josh Edwards was an inexperienced miner when he first began work. The defendant either knew that fact or could have easily ascertained it by inquiring of his brother who was and had been for a year working for it. The instruction, therefore, was not affected in the least degree by the addition of the italicized words.

(b) Instruction No. 2 offered by the plaintiff and refused was to the effect that if the jury believed that Josh Edwards was inexperienced in mine work "then the defendant owed him the duty of warning and instructing him in any danger which they or either of them, or their

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mine foreman or assistant mine foreman knew, or in the exercise of ordinary care should have known by either of them."

There was no error in refusing this instruction. The company's legal duty to instruct the decedent, whether he was experienced or inexperienced, was sufficiently covered by plaintiff's instructions 1 and 3. By No. 3 the court told the jury that if Josh Edwards "was an inexperienced man in coal mining then it was the duty of the defendants either in person or through their superintendent or mine foreman to warn and instruct the deceased in any and all unusual dangers known to them, or which should by the exercise of ordinary care have been known to them or either of them." The same duty would have been owing to an experienced miner; and this, with the statement of the defendant's duty to inexperienced miners, as contained in instruction No. 1, already set out, covered fully the statutory duty of the defendant as to instructing its employees.

(c) The plaintiff asked for Instruction No. 6, shown below, which the court gave after first striking out the parts thereof shown in italics:

"The court tells the jury that it was the duty of the defendant to examine the place where the deceased was required to work, and after having inspected to use reasonable care to remove or secure all loose coal overhead in the place where deceased was required to work, so as to prevent danger to the deceased and other persons working in the said place, *and this duty they could not place upon the miner,* as it was the defendants' personal duty to perform, either themselves or through their mine boss, *and any request to any miner to do so was not sufficient to relieve them of their liability in case of injury resulting therefrom.*"

The court did not err in making the deletions complained of. The mining acts (Acts 1916, p. 773-4, Code, sec. 1863) provides that the "mine foreman shall use reasonable care

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to remove or secure all loose coal, or slate or rock overhead in working places and along haulways so as to prevent dangers to persons employed in such mines." But the same statute also says that "no miner shall continue to work in any working place known by him to be unsafe, or which might have been so known to him in the exercise of ordinary care." The instruction here under consideration, like the statute upon which it is based, deals with loose, overhanging coal, and the instruction was apparently offered to meet the situation in case the jury believed the defendant's theory that the coal fell from the top instead of the side of the mine. As given, the instruction stated the law correctly, and the language stricken out, while not abstractly inconsistent with the residue of the language used, might have led the jury to believe that no amount of knowledge on the part of the decedent, or warning to him, would have barred his recovery, whereas it is well settled that there could be no recovery if the decedent appreciated the danger and remained at work. *V. I. C. & C. Co.* v. *Asbury's Admr.*, 117 Va. 683, 10 Va. App. 729; *Huettel C. & C. Co.* v. *Lawrence*, 117 Va. 728, 10 Va. App. 777.

(d) The plaintiff offered the following instruction, designated as No. 7, which the court refused to give:

"With reference to the duty of the defendant to instruct persons employed, it is not sufficient to relieve the defendant that he instructed the deceased (if they should believe any instructions were given), and that the deceased had capacity to understand, but it must appear from the evidence that the deceased did understand the instructions and that they were being given for his protection, and that he appreciated any danger which would result if he did not obey the instructions."

It is insisted that the court erred in refusing the foregoing instruction, and in support of this contention counsel cite *Griffith* v. *American Coal Co.* (W. Va.), 84 S. E. 621,

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and *Lynchburg Cotton Mills* v. *Stanley*, 102 Va. 590. These cases involved injuries to infant employees under fourteen years of age, and have no application where, as here, the employee is of age and possessed of average intelligence. The above instruction No. 7 was general in its terms, applying alike to all classes of employees, and would apply to the decedent, Josh Edwards, regardless of whether he was of average or less than average intelligence. Therefore, even if there were any evidence in this case to show that the defendant ought to have regarded Josh Edwards as mentally deficient (and we think there is no such evidence), the instruction was wrong. The sufficiency of warnings and instructions for employees must depend, first, upon the age, capacity and experience of the employee, and, second, upon the character of the particular employment. Obviously, therefore, only the most general rules can be laid down for all cases. Speaking thus generally, the instruction to a servant must be sufficient to inform him not only of the conditions under which he is to work, but also of the danger resulting from such conditions. In other words, the instructions must adequately disclose the risk. As said in 3 Lab. M. & S., 2nd Ed., section 1159:

"Stated in the most general terms the extent of the master's obligation in regard to imparting information to a servant is to give him 'such instruction as will enable him to avoid injury.' If the master relies on the fact that he admonished the servant of the danger which caused the injury, he must show that the warning was timely and explicit. Merely going through the form of giving instructions is not sufficient, but the master's duty will be held to have been fully performed if the information which he imparted was sufficient when supplemented by the servant's personal observation to enable the latter to appreciate the risk of the employment." See also 26 Cyc. 1169; 18 R. C. L. p. 572, sec. 79; 20 Am. & Eng. Enc., 2nd Ed., p. 99; *Taylor* v. *Woostan* (Ind.) 50 Am. St. Rep. 200;

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Shaw v. *Hazelton Atlas Co.* (W. Va.), 74 S. E. 910, Ann. Cas. 1914-A 607; 17 Ann. Cas. 490, note.

The rule as above stated by Labatt is necessarily sound because the reason for the rule is that the master must not place the servant in a position in which he cannot adequately care for his own safety. No instructions are requisite when the employee knows, or by the exercise of ordinary care may know, the dangers of his employment. *Swift & Co.* v. *Hutton,* 124 Va. 426, 439.

We are not prepared to approve the instruction as it was offered because, unless restricted to the case of a minor or a mentally deficient person, it states the duty too strongly, in that it requires the employer to insure attentiveness to and understanding of a clear and adequate instruction given to an employee of lawful age and ordinary intelligence. The law does not require this, but permits an employer to assume that a grown person of ordinary sense will understand and heed instructions and warnings which are aptly and clearly given.

(e) The plaintiff asked for an instruction which told the jury in effect that where there is a safe and an unsafe way for the performance of the work in hand, it is the duty of the servant to adopt the safe way if he knows it, or could know it by the use of ordinary care, but that if he does not know the safe way and could not thus ascertain it, then it is the duty of the master to inform the servant of the safe way, and a violation of that duty renders the master liable. The court refused this instruction, but gave the defendant's instruction No. 5 as follows: "The court instructs the jury that if they believe from the evidence in this case that Joshua Edwards had a choice of two ways of performing his duty, one of which was perfectly safe and the other dangerous, and he knew or should by reasonable care have known the fact as to the two ways, and the said Joshua Edwards chose the dangerous way and was injured, then the said Joshua Edwards was guilty of con-

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tributory negligence and the plaintiff cannot recover of the defendants."

There was no necessity for either of these instructions. Both of them ought to have been refused because neither of them had any proper application to the case. Strictly speaking, there were no two ways for the plaintiff to do the work of loading coal into the car with a shovel. Of course it is true that loading coal was part and parcel of the mining which the plaintiff's decedent and his older brother were carrying on, and it may be said that in a sense it was "an unsafe way" to work in the place while exposed to falling coal. The danger, however, was not so directly connected with the actual loading of the coal as that either instruction No. 9 asked for by the plaintiff or instruction No. 5 given for the defendant contained a very apt expression of the law. The question was whether the deceased had been given sufficient opportunity to know the danger of working in that place, and this question was fully covered by other instructions which have already been set out in the course of this opinion.

The rule is well settled that it is error to give an instruction where there is no evidence to support it, and if such instruction may reasonably be regarded as having a tendency to mislead the jury, the error in giving it is regarded as prejudicial and will result in a reversal. See the cases cited in Burks' Pl. & Pr., 2nd Ed., sec. 258, note 14. Defendant's instruction No. 5, however, was harmless in this case. If the jury attempted to apply it at all, they could only have done so by taking it to mean that if the plaintiff's decedent knew or ought to have known better than to stand in the way of the coal which fell on him, he could not recover.

(f) The court modified and then gave instruction No. 10, asked for by the plaintiff, and complaint is made of the modification, but it was plainly unimportant and inconsequential, and will not be further noticed.

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(g) Instruction No. 11, offered by the plaintiff and refused, told the jury in effect that if the defendant failed to comply with the mining law (now found in Code, section 1840) in respect to instructing Josh Edwards, before he began work in the mine, as to any unusual and extraordinary dangers therein, or, if he was an inexperienced miner, in respect to the superintendency and direction of his work by an experienced miner until he had been afforded reasonable opportunity to become familiar with the dangers incident to the work, his injuries, if received by him in the course of the employment, must be regarded as having been proximately caused by such violation of the statute.

In support of the legal proposition asserted in this instruction, counsel for plaintiff cite *Miller Mfg. Co.* v. *Loving*, 125 Va. 255, 18 Va. App. 363, and *Standard Red Cedar Co.* v. *Monroe*, 125 Va. 442, 18 Va. App. 358. These cases belong to a peculiar and restricted class. They are based upon statutes which absolutely prohibit the employment of children in certain occupations. In such cases, while the authorities are somewhat conflicting, the courts have very generally held that the employment in itself is a tort and is to be conclusively regarded as the proximate cause of any injury suffered by the child while engaged in the prohibited employment. The general rule, however, at least in this State, and we think in most jurisdictions, is that to constitute actionable negligence there must be a direct causal connection, other than the mere violation of the statute, between the prohibited conduct and the injury; and whether such causal connection does exit is usually a question for the jury. The rule in general is fully discussed in the case of *Standard Oil Co.* v. *Roberts*, 130 Va. 532, 23 Va. App. 328. We were dealing there with a plaintiff's violation of an ordinance as constituting contributory negligence, but the same principle was involved as here, and the general rule announced as above stated. In that case Judge Prentis, delivering the opinion of the

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court, said: "The jury is not permitted to decide whether or not the violation of an ordinance under such circumstances is negligence and the jury should be clearly told so; leaving them to determine in proper cases whether considering all the attendant circumstances such negligent, unlawful act of the plaintiff was a concurring, contributing and efficient cause of the injury." In 1 Thompson on Neg., sec. 10, p. 12, the author, dealing with negligence arising from the violation of a statute or an ordinance, says: "Here the general conception of the courts, and the only one that is reconcilable with reason, is that the failure to do the act commanded, or the doing of the act prohibited, is negligence as a matter of law, otherwise called negligence *per se;* and this, irrespective of all questions of the exercise of prudence, diligence, care or skill; so that if it is the proximate cause of hurt or damage to another, and that other is without contributory fault, the case is decided in his favor, and all that remains to be done is to assess his damages."

In Vol. 7 of the same work (White's Supplement 1907), section 10, page 3, it is said: "The doctrine that disobedience of a statute or ordinance is negligence *per se* is to be understood as qualified in all cases by the condition that such disobedience must have been the proximate cause of the injury complained of, or at least contributed thereto."

See also Watson on Damages for Personal Injury, section 256; 21 Am. & Eng. Ency. L. (2d ed.), p. 480; 29 Cyc. p. 439, cl. (g); 20 R. C. L., p. 43, sec. 37.

Plaintiff's instruction No. 4 told the jury that if they should believe from the preponderance of the evidence that the defendant was guilty of negligence as charged in any of the counts of the declaration, and that such negligence was the proximate cause of the plaintiff's injury, they should find for the plaintiff; his instruction No. 5 contained a definition of proximate cause as used in the in-

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structions; and his instructions 1 and 2 left to the jury the question whether the violation of the statute was the cause of the injury. His proposed instruction, No. 11, on the other hand, took from the jury the question of proximate cause, and told them that they were obliged to find that the violation of the statute was the proximate cause of the plaintiff's injury. This was wrong and the instruction was properly refused.

(h) The plaintiff requested and the court refused the following instruction, to-wit:

"The court further says that a servant has a right to presume that the master has performed the duties imposed upon him by law, and does not assume any of the risks arising from the failure of the master to perform said duties, unless he knows of them, and appreciates the dangers arising therefrom."

There was no error in refusing this instruction, because while it embodied a correct legal proposition, it had no application to the case as made by the evidence. The only violation of duty on the part of the defendant which the evidence tended to show, and which at the same time could be regarded as the proximate cause of the injury, was a violation of the statute as to warnings and instructions, and there was certainly no occasion for telling the jury that the plaintiff's decedent had a right to assume that he had been instructed and warned. The court accorded to the plaintiff his full legal rights in this particular by telling the jury that if the defendant violated the statute, and violation thereof caused the injury, he had a right to recover. This latter proposition was in substance stated to the jury more than once in the course of the instructions.

(i) Defendant's instruction No. 2 was objected to, but given, and the plaintiff excepted. The instruction was as follows: "The court instructs the jury that if the jury believes from the evidence that the place where Joshua Edwards was to work was reasonably safe in the first in-

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stance and was afterwards rendered unsafe by the negligent manner in which Joshua Edwards or John Edwards performed their work, and that Joshua Edwards was cognizant of the fact, or should have known the danger, by the exercise of reasonable care, then the negligence was the negligence of the plaintiff or a fellow servant, and plaintiff cannot recover."

This is a curiously phrased instruction, and unnecessarily but harmlessly brings into the case a reference to the fellow-servant doctrine. That doctrine, of course, would not apply if the mining act was violated and the violation thereof proximately caused the plaintiff's injury. This was pointed out in *Clinchfield Coal Corporation* v. *Hawkins*, cited *supra*. But the instruction, while assigning a wrong reason in part, correctly told the jury that under the conditions supposed in the instruction the plaintiff could not recover. If the place was reasonably safe in the first instance and became unsafe by the negligent manner in which either Josh or John Edwards performed their work, and Josh Edwards knew, or could have known, the danger thus arising by the exercise of ordinary care, then, no matter whether John Edwards was a fellow servant or stood in some other relation, even that of a vice-principal, the plaintiff, upon the plainest principles, could not recover. This in substance is what the instruction told the jury, and the reference to the relationship of fellow servant could not in any way have prejudiced the plaintiff.

It is said that there was no evidence to justify the hypothesis in the instruction that the place was rendered unsafe in the course of the work, but this contention is plainly wrong. It was the defendant's theory that the coal which fell was negligently left hanging overhead in an obviously dangerous condition in the course of the work prosecuted by John Edwards while his brother Josh was working with him. There was evidence tending to show that this was

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true, and the instruc[illegible] therefore, cannot be said to be without evidence to suppor[illegible]

(j) The plaintiff also excep[illegible]ed to the giving of defendant's instructions Nos. 3, 6, 7, 8, 10, 11 and 12. We have given careful attention to all of the[illegible]se instructions and to the objections thereto specified by co[illegible]sel in the brief accompanying and forming a part of the [illegible]ssignments of error, and it must suffice to say that in so fa[illegible] as all such objections have not hereinbefore been discus[illegible]sed and disposed of, they present no questions of importa[illegible] and do not demand further consideration.

4 }

4. The last assignment of error arises in this way[illegible]: The defendant (although generally referred to in this op[illegible]inion in the singular and as a company) is not a corporat[illegible]ion, but a partnership composed of four individuals, one [illegible] of whom, Dr. T. C. McNeer, testified as a witness. On [illegible]his examination in chief he had said that the defendant co[illegible]mpany was a partnership and that he was one of the pa[illegible]rtners. On cross-examination he was asked this questio[illegible]n: "You have stated that the defendant is a partnership com[illegible]posed of yourself and others. I will now ask you if ther[illegible]e is a recovery in this case if there is any liability on any one else than the defendant." The defendant excepted to thi[illegible] question and the court refused to permit an answer. There[illegible] upon the plaintiff avowed that if the witness were per[illegible]mitted to answer he would say that there would be a liabil[illegible]ity on the insurance company, the United States Fidelity & Guaranty Co. of New York, and that said company was present making and assisting in the defense of the case.

It is said in the brief for the plaintiff that defendant's counsel had in the opening statement spoken of the hardship it would cause if judgment were rendered against the defendant; that Dr. McNeer "was on the stand apparently for no other purpose than to win the sympathy of the jury;" and that the question above quoted was asked and the ans-

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wer thereto sought "to counteract this unfavorable expression of counsel and the doctor's appearance before the jury," by showing that the defendants were insured and that a verdict against them would result in no hardship. These excuses for the question do not appear in the record. It is further said in the brief: "Besides, it was a matter of common knowledge in the coal fields that operators of coal mines are not as careful if insured as if not, for the consequent loss falls on the insurer and not on the operators when there is negligence resulting in injury."

It is clear, both upon reason and authority, that the court was right in refusing to permit the question to be answered. That the company carried liability insurance was wholly irrelevant, and that the protection thus afforded may have tended to render them less careful than they would otherwise have been was likewise wholly irrelevant, because the question of liability depended upon the fact of negligence, and not upon the motives or influences which may have brought it about. *Va. Car. Chem. Co.* v. *Knight,* 106 Va. 674, 681, 1 Va. App. 11.

This case was tried upon correct principles; the determinative questions, which, as hereinbefore pointed out, depended for their decision upon the weight and credibility of the testimony, were fairly submitted to the jury; and the verdict must stand.

Affirmed.

FERGUSON, ET AL., *v.* SUPERVISORS OF ROANOKE COUNTY.

(*Staunton, September 21, 1922.*)

1. ROADS.—Toll Gates—Right to Maintain—"Macadamized" Road—Constitution, sec. 65—Code, sec. 2743; Acts 1920, p. 398.

Appeal from Circuit Court of Roanoke county.

Affirmed.

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Jackson & Henson, for the appellants.

R. T. Hubbard and *Kime & Kime*, for the appellees.

PRENTIS, J.:

The appellants are citizens of Roanoke county, who filed their bill against the board of supervisors of Roanoke county for the purpose of forcing the removal of a toll-gate and the prevention of the collection of tolls, upon a certain public road in that county. There was a demurrer which does not seem to have been passed upon by the trial court. There was also an answer, which denied the material allegations of the bill, and alleged facts which, if proved, would have constituted a complete defense. Depositions were taken by the complainant and there was a final decree denying the injunction prayed for and dismissing the bill, from which this appeal was taken.

It appears that the gate here complained of had been established at the instance of a large number of interested citizens, who had agreed to contribute $5,137, to be expended in the improvement of the road, which the board had supplemented by an appropriation of $500 for the same purpose.

There are two pertinent statutes: One, Code section 2743, conferring legislative powers as to certain local matters upon boards of supervisors of every county, among which is the authority to establish and maintain toll-gates, which is expressed in this language: "To establish or abolish tolls on roads built and maintained wholly by the county and not receiving aid from the State." The other a special act (Acts 1920, p. 398) which reads thus: "The board of supervisors of Roanoke county is hereby authorized and empowered at its discretion, to erect and maintain toll gates on such roads in the aforesaid county as the said board may have heretofore macadamized or may hereafter macadamize, except roads in the State highway system, charging thereon such toll as the aforesaid board may deem

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advisable and proper, with the right to grant rebates on tollage to any person, who may have paid anything out of their private funds toward the construction of any such roads; provided, however, that no toll gate shall be erected on any road within one mile of the corporate limits of Roanoke city; except that where a toll gate is now established within the mile limit the same may be continued."

The only testimony in the record is that of three witnesses for the complainants, to the effect that although broken stone had been used on its surface, the road had never been macadamized, and the case appears to have been largely rested upon this contention. By agreement of the parties the judge of the trial court personally inspected the road before entering the decree. As tending to support the contention that it had never been macadamized, the complainants have also filed certain specifications of the Highway Department, showing in detail the character of macadamizing which is required on State highways, and insist that as this road in its construction falls far short of such requirements, therefore the road has not been macadamized within the meaning of the special act above cited.

We cannot agree that this is conclusive of that question. While macadamized roads are those which are covered with small, consolidated, broken stone, either on a soft or a hard substratum (Standard Dict.), this very definition shows that all macadamized roads are not built by the same specifications. The word is used to indicate a certain type of road, first conceived by the Scottish engineer, John Loudon Macadam. The characteristic feature of such roads is that the materials used in their construction, chiefly broken stone, are so compacted as to exclude moisture therefrom so far as it is possible to do so, and their peculiar excellence depends upon this compactness. It may be that the State Highway Department requires the construction of State highways to be of a very much higher and more permanent type than would be required or be reasonably necessary

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in the construction of a county highway over which there would be less travel. However this may be, the General Assembly has not in the act referred to defined the word "macadamize," and we know of no sufficient reason for giving it any other than the usual and accepted construction.

We are referred to certain cases as defining the word, and describing such roads: *Partridge* v. *Lucas*, 99 Cal. 520, 33 Pac. 1083; *McNamara* v. *Estes*, 22 Ia. 255; *State ex rel. Haden* v. *Curry*, 1 Nev. 251; but we cannot agree with the conclusions which counsel for the appellants appears to draw therefrom, or agree with him in his conclusion that under this statute, to macadamize a road, means to build a road according to certain fixed and definite specifications.

In this case there is the additional consideration that the board is not limited by the special act, but under Code, section 2743, may establish tolls on any county road except those receiving State aid. We say this because the language of that statute, fairly construed, recognizes only two classes of public roads—that is, State highways or roads receiving State aid, and county highways or public roads which do not receive such aid. Voluntary contributions made by citizens for the improvement of the public highways do not change their character or in any wise diminish the control thereof which is by law vested in the public authorities. That statute then appears to confer plenary power upon boards of supervisors to collect tolls on such county roads—that is, on those upon which no State funds are expended.

Possibly reference to some general doctrines may be helpful.

Counties are *quasi* municipal corporations, and the boards of supervisors, as the representatives of the political body, the county, are clothed with certain legislative and discretionary powers, and equity as a general rule refuses to

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interfere by injunction with the exercise of those discretionary powers at the suit of a private citizen.

This comprehensive statement, among others, appears in 2 High on Injunctions (4th ed.), sec. 1240: "No principle of equity jurisprudence is better established than that courts of equity will not sit in review of the proceedings of subordinate political or municipal tribunals, and that where matters are left to the discretion of such bodies, the exercise of that discretion in good faith is conclusive, and will not, in the absence of fraud, be disturbed. And the fact that the court would have exercised the discretion in a different manner will not warrant it in departing from the rule." Many cases are there cited in support of this general doctrine.

It is also true, as a general proposition, that, subject only to constitutional limitation, the legislature has supreme control over streets and highways, (*Norfolk, etc., Co.* v. *Norfolk,* 115 Va. 177), while Constitution, section 65, in terms provides that, "The General Assembly may, by general laws, confer upon the boards of supervisors of the counties and the councils of cities and towns, such powers of local and special legislation, as it may from time to time deem expedient, not inconsistent with the limitations contained in this Constitution." *Polglaise's Case,* 114 Va. 850, 7 Va. App. 327, 76 S. E. 897; *Standard Oil Co.* v. *Commonwealth,* 131 Va. 24 Va. App. 624, 109 S. E. 317.

Courts of equity have no authority to interfere by injunction with the exercise in good faith by municipal bodies of discretionary powers conferred upon them by law. *Harrisonburg* v. *Roller,* 97 Va. 584, 34 S. E. 523.

The principle is extended even to a private corporation, for courts of equity cannot substitute their own business discretion and judgment for that of a company on matters intrusted to it by law. This is held with reference to a cemetery company, where a decree of the trial court which

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held that the fees fixed for digging graves was unreasonable, and was here reversed because the general law authorized the company in its discretion to make reasonable rules and regulations for the management of its affairs and the disposition of its property. *Roanoke Cemetery Co.* v. *Goodwin*, 101 Va. 605, 44 S. E. 769.

In *Reynolds* v. *Shreveport*, 13 La. Ann. 426, it was held that where the subject matter is within the scope of the powers and duties of the officials of a municipal corporation the presumption is in favor of the propriety and good faith of their conduct, and the complainant must make out a good case of wilful oppression in order to obtain relief from the court. This presumption is founded on reason as well as sanctioned by law.

In a case involving the appropriation of county funds for constructing an expensive stone trench or channel as substitute for a tubular bridge which had proved to be too small to carry the flow of water across a highway, it was held that a court of equity is not a tribunal to correct such alleged errors of subordinate departments of government, because to them is commited the discretion of deciding upon the necessity of building bridges, with power to determine whether they are necessary to the safety, convenience and freedom of the public travel, and that so long as they exercise their discretion honestly, and to the best of their ability, and not to further a corrupt purpose, their determinations are beyond the supervisory power of any court. *McKinley* v. *Chosen Freeholders of Union Co.*, 29 N. J. Eq., p. 164.

The erection of toll gates in Virginia on such county roads, in the discretion of the board of supervisors, is sanctioned by law and injunction does not lie to restrain the exercise of such a power so lawfully conferred unless and until it is shown that the power has been exceeded or abused to the injury of the complainant.

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Authorities could be multiplied, but we shall content ourselves with citing these: *Mt. Carmel* v. *Shaw*, 155 Ill. 37, 46 Am. St. 311; *People* v. *New York*, 32 Barb. 103; *State* v. *Mayo*, 106 Me. 62, 75 Atl. 295, 26 L. R. A. (N. S.) 508; *Valparaiso* v. *Hagen*, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707; *Goszler* v. *Georgetown*, 6 Wheat. 593, 5 L. Ed. 339; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 49 L. Ed. 643, 25 Sup. Ct. 358, 3 Am. & Eng. Ann. Cas. 765.

Applying the principle to the facts of this case, it is to us apparent that the establishment of such toll roads is by the Virginia Constitution and statute committed to the legislative discretion of the boards of supervisors, and courts of equity, in the absence of some fraud or abuse of power, will decline to run a race with the local authorities in the determination of the wisdom or unwisdom of the establishment and maintenance of these toll gates on this county road. The long arm of equity will be extended, and if necessary lengthened, for the preservation of property rights which are imperiled by the unauthorized or unconstitutional exercise of power by legislative sanction. Equity, however, is consistent, recognizes its own limitations, and is not so inconsistent as to attempt the revision or supervision of governmental action lawfully exercised through the legislative department. The evil arising out of the unwise exercise of legislative discretion which causes inconvenience, but invades no right, can only be corrected, either by appeal to the legislative department to repeal the law, or at the ballot box by the defeat of those charged with its administration. The power to erect and the responsibility for the maintenance of such toll gates rest with the board of supervisors while in office, as the representatives of the people, and their discretion will not be supervised or controlled by the courts, unless it is manifest that they have abused and exceeded their power. Mere differences of opinion between those in office charged with

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such responsibilities and those out of office who differ with them in judgment will not sustain judicial interference.

Then, as confirming the result already indicated, we observe that there are certain presumptions which arise here out of this meagre record: (1) That the allegations of the bill, which are denied by the answer and not proved, must be ignored; (2) that the action of the board of supervisors in such local matters, with reference to which they are invested with discretion, in the absence of contrary proof, is presumed to be in good faith and legal; and (3) that the burden is upon the appellants to show error, and if they fail to do so, there is a presumption that the decree of the trial court is right.

Upon the whole case we are of opinion to affirm the decree.

Affirmed.

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N. B.—All opinions printed in this number are subject to rehearings which may be granted under the above statute.

JUDGES.

HON. JOSEPH L. KELLY, President.

HON. ROBERT R. PRENTIS. HON. MARTIN P. BURKS.

HON. FREDERICK WILMER SIMS. *HON. JESSE F. WEST.

*Elected to succeed Hon. Edward W. Saunders, died December 16, 1921. Judge West was seated February 1, 1922.

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VIRGINIA APPEALS

FRENCH, ET AL., *v.* STANGE MINING COMPANY, ET AL.

(*Staunton, September 21, 1922.*)

1. EQUITY. — Bill—Demurrer—Jurisdiction—Discovery—Accounting—Subrogation—Multiplicity of Suits—Legal Demand—Affidavit to Bill—Code, secs. 6236, 6237, 6238—U. S. Comp. Stat. 1918, sec. 8583 (6)—Measure of Damages—Willful Trespass—Burden of Proof—Cost of Transportation.
2. IDEM.—Duty of Court to Transfer Cause to Law Side—Code, sec. 6084—Waiver of Benefit of Statute.

Appeal from Circuit Court of city of Roanoke.

Affirmed.

W. B. Snidow and *Chase & McCoy*, for the appellants.

Jackson & Henson, Williams & Farrier and *T. D. Savage*, for the appellees.

KELLY, P.:

This is a suit in equity for a discovery and an accounting. The decree from which this appeal was taken sustained a demurrer and dismissed the bill.

The appellants, hereinafter designated as the complainants, are the heirs at law of one Davis Byrnes, and as such inherited his title to a tract of land containing 177 acres. This land lay within the boundaries of a larger tract which had been sold by the Camp Manufacturing Company to one B. T. Johnson, Jr. There was a valuable deposit of manganese ore on the 177 acres, and early in the year 1918 the complainants, through their agent, J. R. Miller, began

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to mine and remove the ore therefrom. Thereupon, Johnson brought an injunction suit against Miller, and in the course of that suit all the Byrnes heirs were made parties, and a final decree was rendered therein on April 1, 1919, whereby it was adjudged that the Byrnes heirs had a superior title as to 86.8 acres of the land in controversy between them and Johnson.

It is necessary, in order that there may be any approach to a clear and satisfactory presentation and disposition of the questions arising upon this appeal, to set forth somewhat at length the allegations and prayer of the very voluminous bill which has been filed in the cause. After stating the facts above recited, the bill makes, *inter alia*, the following allegations:

(a) That ninety per cent of the manganese deposit is or was on the 86.8 acres adjudged as aforesaid to be the property of the complainants;

(b) That during the pendency of the above mentioned injunction suit, and prior and subsequent thereto, B. T. Johnson, Jr., and the parties hereinafter named claiming under him, mined and removed manganese from the 86.8 acres;

(c) That on April 23, 1918, Johnson entered into a written contract with one Ernest S. Suffern granting the latter the right to mine and remove the minerals from the boundary acquired by Johnson from the Camp Manufacturing Company (which included the 86.8 acres subsequently adjudged to the complainants);

(d) That by contract of June 10, 1918, Suffern sold and assigned to one Ottomar Stange all the rights and interest in the minerals acquired by him under the contract with Johnson, and that Stange shortly afterwards transferred the rights and interest thus acquired by him to a Virginia corporation known as Stange Mining Company, Incorporated, the charter for which was procured

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June 29, 1918, by Stange and wife and one Bonewell, through which corporation Stange and wife proceeded to carry on mining operations on the premises;

(e) That a large part of the money received by Johnson, Suffern and Stange from manganese mined and sold from the 86.8 acres was paid to the Camp Manufacturing Company as part of the purchase money due to that company from Johnson for the larger boundary acquired from it by him as aforesaid, and that the company knew at the time of such payments to it that some of the money was derived from the sale of manganese from the 86.8 acres, but did not know whether all or only a part thereof came from proceeds of manganese mined from complainants' land;

(f) That there has been mined from complainants' 86.8 acres "some 100 railroad cars or more of high grade manganese * * by the said B. T. Johnson, Jr., and by those claiming under him * * but complainants are unable to ascertain or state the exact number of said cars or the number of tons of manganese shipped, but they are informed that each of said cars of manganese were loaded with from 40 to 50 tons of high grade manganese all taken from the said land, and that this manganese was sold by the said Johnson and others at various prices, ranging from probably as low as fifty dollars per ton to as high as one hundred and twenty dollars per ton; and that said Johnson and others have receieved from the said manganese sold off of the said Byrnes land * * from two to three hundred thousand dollars, but your complainants are unable to ascertain or here state how much has been received by the defendants to this suit for said manganese shipped from said land and sold by said defendant;"

(g) That "the various transactions between the Camp Manufacturing Company and the other defendants to this suit have been largely conducted in the name of the defendant, B. T. Johnson, Jr., who is insolvent, but the said defendants have all shared with him the proceeds of the

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sale of said manganese; therefore, complainants charge that all of the defendants are jointly and each of them are severally liable to complainants for the full amount received by them and by each of them and all of them for said manganese, and that they and each of them are jointly and severally liable to complainants for the full value of all of the said manganese mined and removed from complainants' said land;"

(h) That Martin Williams, M. P. Farrier and H. W. Hale are each severally personally interested with B. T. Johnson, Jr., and the other defendants in the mining, removal and sale of said manganese and have each received a part of the proceeds,. but complainants are unable to ascertain and allege just what amount they have received or what their interests are, and they therefore call upon the said Williams, Farrier and Hale to make disclosure as to their interest in the mining operations and the amount received by them;

(i) That the defendants, both before and after the decree of April 1, 1919, in the injunction suit, have mingled the ore taken from the 86.8 acres with ore from outside of that land, and probably have no means at this time of showing just how much manganese mined and shipped by them came from complainants' land, but that at least 95 per cent of defendants' total shipments came from the 86.8 acres;

(j) That Stange and wife acquired a controlling interest in the stock of the Bland County Lumber Company which owns or claims a tramroad over which certain of the manganese was hauled from the mine to the railroad, and that this company received from Johnson and other defendants large sums of money arising from the proceeds of the manganese for transporting the same and also for improving its tram road, but complainants do not know the amount of such sums of money, or how, or when paid;

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(k) That all the ore shipped by defendants from the territory in which complainants' land is situated moved over the New River and Holston railroad and thence over the Norfolk & Western railroad, but that complainants have been unable to ascertain to whom or when the ore was shipped, or the number of tons shipped, because both railroads, pursuant to "provisions of a Federal statute" refused to furnish the information;

(l) That complainants are unable to ascertain and allege "just how such manganese has been mined, shipped and sold by each of the several defendants * * * from the Byrnes tract of land * * * or the price received, or where, when and to whom said manganese was shipped or sold, and at what price, and what part of the proceeds * * * have been paid to Camp Manufacturing Company * * * and all of the defendants hereinafter named are also called upon to disclose and answer fully in regard thereto;"

(m) That "great difficulties will attend the prosecution by complainants of an action at law for their claim for the manganese removed" in ascertaining the number of tons, the value thereof, the amounts received therefor, &c., and that complainants have no means of proving these facts except by a discovery from defendants.

In addition to certain formal parties not necessary to mention in this connection, the defendants named in the bill are Stange Mining Company, Ottomar Stange, B. T. Johnson, Jr., Camp Manufacturing Company, Martin Williams, M. P. Farrier, H. W. Hale and Bland County Lumber Company. It is explained that complainants do not make Ernest S. Suffern a party because he is a nonresident and has no property in this State.

The bill prays for a full disclosure from the defendants, the particulars of this prayer being hereinafter more fully referred to; and for an account of and a recovery against

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the defendants for the manganese mined and removed by them; and for general relief.

Demurrers were interposed by the defendants, and the material part of the decree now under review was as follows:

"On consideration whereof, the court being of the opinion that said demurrers are well founded, it is adjudged, ordered and decreed that said demurrers be, and are hereby sustained, with leave to amend if the plaintiffs be so advised, and the plaintiffs signifying their intention to stand by their bill, and not to amend same, and making no motion to remand this case to the law side of the court as to any of the parties defendant, it is adjudged, ordered and decreed that the plaintiffs' bill be dismissed and that the defendants recover of the plaintiffs the costs of this suit."

It is insisted by the complainants that the bill presents four distinct grounds, any one of which would be sufficient to support the jurisdiction in equity, namely, (1) Discovery, (2) Accounting, (3) Subrogation, and (4) The prevention of a multiplicity of suits. We shall consider these grounds in the order named.

1. This is not a pure bill of discovery. It seeks other relief. Not only is this true, but, unless some one or more of the remaining three grounds of equitable relief invoked by the complainants can be sustained, the bill is one seeking by the prayer for discovery to transfer to a court of chancery jurisdiction over a purely legal demand—*i. e.*, a demand for the value of ore unlawfully taken from the land. To accomplish such a transfer of jurisdiction, a complainant must allege facts showing that he could not recover at all without the discovery. In addition to the requisite allegations in this respect, the plaintiff must make affidavit to the bill, and no such affidavit appears in this case, but this point is not raised before us by the demurrer or in argument, and we pass it without further comment.

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In *Larkey* v. *Gardner*, 105 Va. 718, 720, this court said: "In a pure bill of discovery it is not necessary to allege that only by discovery can the plaintiff sustain his demand. In such a case full relief of equity is not asked, but only its aid to make the applicant stronger in a court of law. But where the complainant asks a court of equity for both discovery and relief, and his demand is proper for the law court, and he seeks to transfer it to a court of chancery, he must show that only by discovery can he recover. He must allege that the facts concerning which a disclosure is sought are material, and that he has no means of proving those facts by the testimony of witnesses or by any other kind of evidence used in courts of law; that the only mode of establishing them is by compelling the defendant to make disclosure, and, therefore, that a discovery by suit in equity is indispensable. Unless such averments are required it is obvious that the boundaries between the chancery and common law courts would be broken down, and that chancellors would find themselves, under a colorable disguise, changing the forum of litigation, and assuming the settlement of controversies belonging exclusively to the common law courts."

In *Pruitt* v. *Citizens National Bank*, (W. Va.), 66 S. E. 231, the West Virginia Supreme Court said: "If his bill had prayed only discovery in aid of his defense in the action at law, the rule by which to test the sufficiency of the allegations thereof is very liberal, and we might well sustain it; but he prayed both relief and discovery. In order to sustain such a bill, he must comply with strict and rigid requirements. He must show that the evidence he seeks to obtain by his discovery is not only relevant, material and beneficial, but also absolutely indispensable to his defense and impossible of acquisition in any other way. *Thompson* v. *Whittaker Iron Works*, 41 W. Va. 574, 580, 23 S. E. 795; *Dudley* v. *Niswander & Co.*, 65 W. Va. 461, 64 S. E.

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745; *Armstrong* v. *Huntons*, 1 Rob. (40 Va.) 323; Hogg's Eq. Pro., 164. The reason for this distinction is that, in the case of a bill for discovery only, the object is merely to obtain evidence for use in the trial of the action at law, while, in a bill for both discovery and relief, the purpose is much broader; the objects being to elicit evidence, and also to transfer the case from the legal to the equitable forum. It is so well marked and defined by the decisions that no further discussion of it is necessary." See also to the same effect Lile's Eq. Pl. & Pr. (2d ed.), sec. 150, and authorities cited there.

The foundation of the complainants' demand in this case is a trespass on real estate. For this trespass they could elect among several remedies at law. They could bring an action for damage to the land, or they could waive this damage and bring an action of detinue or trover for the ore or for its value. *Wood* v. *Weaver*, 121 Va. 250, 258, 14 Va. App. 175. The allegations in the bill as to the discovery sought do not measure up to the requirements for a transfer of this legal demand to the equity forum. There are, to be sure, certain general allegations to the effect that the complainants are dependent upon the disclosures called for in order to establish their claim. But these are mere conclusions of law which are negatived by the particular facts alleged in the bill, as will more clearly appear upon an examination of the prayer for discovery. The several disclosures prayed for are as follows:

"(a) The number of railroad cars of manganese shipped from Flat Top Mountain in Bland county, Virginia, over the New River and Holston Railroad, and the date each car was shipped, together with the car number and to whom shipped, and the number of tons of manganese contained in each car."

All the information here demanded would be readily available in an action at law. The defendant shippers

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themselves are competent witnesses and may be compelled to testify for complainants; and sections 6236 and 6237 of the Code of 1919 (sections 3370 and 3371, Code of 1887) provide a simple and adequate method whereby, upon proper affidavit or interrogatories, these defendant shippers may be required to furnish in detail all such information, and all their books and writings relevant thereto.

In Lile's Equity Pleading & Practice (2d ed.), section 152, the author says: "Bills of discovery are now, with us, in large measure, superseded in practice by two statutory provisions, one allowing *a court of law* to compel a discovery on oath, in answer to interrogatories filed, where it would be compelled upon a bill of discovery, if the interrogatories have not been unreasonably delayed; and the other declaring *parties to suits competent to give evidence* on their own behalf, and to be competent and compellable to attend and give evidence on behalf of any other party to the proceeding."

And, to like effect, in Burks' Notes on Equity Procedure, page 39, it is said: "Now that the defendants are competent witnesses and may be examined by the complainant on any matter involved in the litigation, it is very rare that a defendant is called upon for relief of this kind, as the complainant has ample remedy by sections 3370 and 3371 of the Code." (Sections 6236 and 6237, Code 1919.)

It is true that section 6238 of the Code (3372, Code of 1887) provides that "the two preceding sections shall not preclude a person, who does not file such interrogatories or affidavit, from exhibiting his bill in chancery for a discovery, as he might have done if the said sections had not been enacted." But this provision has no effect upon the rule already pointed out that where, as here, the disclosure is sought for the enforcement of a purely legal demand the discovery must be essential to the plaintiff's case. The statutes referred to do not abolish the relief in pure bills

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of discovery, or in bills for discovery in aid of the enforcement of an equitable right; but it would seem that they do have the effect of eliminating this remedy "in mixed bills of discovery, when the jurisdiction at law is sought to be transferred to a court of equity, on the sole ground that discovery in equity is necessary." *Johnson* v. *Mundy*, 123 Va. 730, 744. At any rate, if the statutes in question do not go to the full extent here suggested, it is clear that they reduce to a minimum the cases in which a discovery in equity may be availed of in transferring to that forum jurisdiction of a legal cause of action. The cases must be rare indeed, if any, in which, under the broad provisions of our present statutes, a plaintiff may not obtain as full disclosure in aid of his legal cause of action as he could obtain by a bill of discovery. If there be such exceptional cases, this is not one of them.

The foregoing considerations are conclusive against the right of discovery in this case, but a further equally conclusive answer to the complainants' prayer for disclosure as to shipments of ore is that the information sought may be obtained by summoning the agents of the railroad company to testify. It is conceded that the Federal statute referred to in the bill, and pursuant to which the railroad company refused to furnish the information, is found in U. S. Complied Statutes 1918, page 1362, section 8583, subsection 6. That statute contains this express proviso: "That nothing in this act shall be construed to prevent the giving of such information in response to any legal process under authority of any state or federal court."

The complainants were not dependent upon a discovery in equity for proof of the shipments from the mine, and it follows that they cannot sustain the jurisdiction in equity upon that ground.

The next disclosure prayed for is this: "(b) The price for each of these cars of manganese removed, giving date

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of payment, the amount paid, and by whom and to whom paid."

The prices received by the defendants are not material. The complainants are not entitled, under the averments in the bill, to recover the purchase price of the ore as a finished product. This would be the measure of damages if the defendants had been wilful trespassers, but they cannot be so regarded. The measure of damage in this case is the value of the ore in place, or what may be termed its royalty value. *Wood* v. *Weaver*, 121 Va. 250, 258; 38 Cyc. 1133. The determination of such value would not be materially aided by the information sought in this part of the prayer.

It is true, as held in *Wood* v. *Weaver, supra,* that "every trespass is *prima facie* wilful, and the trespass being conceded or proven, the burden of proof is on the defendant, unless it appears from the evidence of the plaintiff, to show that the trespass was not wilful." But in this case the wilfulness of the defendants' conduct is negatived by the allegations of the bill. Johnson and those claiming under him were in good faith asserting title to the whole of the 177 acres, and actually prevailed in that claim as to about one-half of the land. There is an allegation in the bill that the Stange Mining Company, and Ottomar Stange and others interested with him, continued to mine and remove ore from the premises after the final decree had been entered in the injunction suit of Johnson against Miller; but Stange and his associates were not parties to that suit, and the bill in the present case is not clear enough in its allegations to warrant the holding that they knew of that decree before they quit mining. It seems (from other allegations in the bill) that they desisted as soon as complaint was made to their counsel and they were advised to cease their operations.

But if it be conceded that the complainants were entitled, in addition to the amount of the tonnage shipped, to know

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and prove the prices received therefor, they could have required the defendants to give that information at law as easily and completely as in equity, in the manner hereinbefore pointed out.

A further prayer for discovery is as follows: "(c) The amount paid by the defendants or any of them to the said Bland County Lumber Company, Incorporated, for transporting and hauling manganese from the mines to the railroad at First Ford, with the date of each payment, and also a full statement of all moneys paid by any of the defendants in the construction, extension or improvement of the railroad from said mines to said First Ford."

This information is wholly immaterial to any purpose of this suit. The prayer is not confined to money received from sales of manganese and paid to the Lumber Company, but if it were, the amount so paid would have no bearing upon the right of the complainants to recover nor upon the proper amount of such recovery. Moreover, if the disclosure here demanded were material, the facts sought to be elicited by it could be obtained at law from the defendants and from the agents of the Lumber Company as witnesses. No liability on that company is alleged, and discovery can not be exacted of a mere witness, as will hereinafter be more particularly pointed out.

The remaining disclosures called for in the prayer of the bill are as follows: "(d) The date and amounts paid by the said B. T. Johnson, Jr., and each and all of the other defendants in this suit, to the said Camp Manufacturing Company on the purchase price of the said large boundary of land * * * ; and, (e) how much, if anything, is still due and owing from the said Johnson or any of the other defendants to this suit to the said Camp Manufacturing Company on the said purchase price of the said large boundary of land and upon the said deed of trust (securing part of the purchase money) dated the 8th day of

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October, 1917, from the said Johnson to the said P. R. Camp and Martin Williams, trustees" (in said deed of trust).

We have been unable, upon the most liberal view of the allegations of the bill from the standpoint of the complainants, to perceive any reasons entitling them to the disclosures sought to be elicited by this prayer. It may be noted, in the first place, that, as to payments which may have already been made to the Camp Manufacturing Company, the prayer for discovery is not limited to moneys derived from the sale of manganese from complainants' lands, but is altogether general. But this aside, none of the disclosures here sought are pertinent to the establishment of the complainants' alleged cause of action. Payments already made and amounts yet due to Camp Manufacturing Company could have no relationship to the legal demand except as showing the beneficial interest of Johnson in the land purchased by him from the company, and this would only become material after the demand had been reduced to a judgment and its collection was being sought. If, however, the information in question were now pertinent, it could as readily be obtained from the defendants as witnesses in an action at law as by a discovery in equity. This proposition is too plain for argument, and, for the reasons and upon the authorities already referred to, defeats the right of complainants to compel the disclosures in the equity forum.

Furthermore, so far as the Camp Manufacturing Company is concerned, there is another conclusive reason why the discovery must be denied. Except as to the alleged right of subrogation, which, as we shall see, does not exist, there is no theory or contention in the case upon which to base any relief as against this company. The sole object of the discovery as to it, therefore, is to obtain evidence from a stranger to the controversy, and it is well

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settled that a bill of discovery will not lie against a mere witness. *Hurricane Tel. Co.* v. *Mohler,* 51 W. Va. 1, 41 S. E. 421; 1 Pom. Eq. Jurisp. 2nd Ed. 199; 6 Encyc. Pl. & Pr. 761; Story's Eq. Jurisp. sec. 1489.

It follows from the foregoing discussion, the discovery in equity must be denied unless the bill can be maintained upon some of the independent equitable grounds relied upon by the complainants. These will now be considered.

(2) With the exception of the prayer for general relief, the only prayer in the bill not already set out is the following:

"That an account be taken in this cause and that it be ascertained the amount and value of all the manganese heretofore mined and removed from the said lands owned by the complainants, and to whom the same was sold, and when sold and the price received for same including interest from the date the said manganese was mined and removed, and that they may have judgment against the said defendants therefor."

It is claimed that the facts alleged in the bill, followed by this prayer for an account, are sufficient to give equity jurisdiction upon the ground of accounting. We do not think so. As already pointed out, the complainants have not shown themselves entitled to prove, as tending to establish their legal demand, the prices for which the ore was sold, but must be confined to proof of the amount removed and its value before the severance was effected. Even if the prices received for the finished product were material, the account would be a very simple one with the items all on one side. No fiduciary relationship existed between the parties, and no equitable interest or estate was involved. Many authorities are cited by counsel for complainants showing the comprehensiveness of the jurisdiction in equity in matters of accounting, and the readiness of the equity courts to assume jurisdiction on that ground. We shall not

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attempt any review of these authorities. They fully sustain the general propositions relied on, but none of them go far enough to warrant an assumption of the jurisdiction upon so simple an account as is here involved, unaffected by difficulties less troublesome in equity than at law, and unaccompanied by other equitable grounds. This conclusion is clearly supported by the opinion delivered by Judge Keith in the case of *Oglesby & Co.* v. *Ould & Co.*, 117 Va. 546, relied upon by counsel for complainants. The jurisdiction in that case was sustained on the ground that the account was long and complicated, and that the remedy at law was not as full, adequate and complete as was afforded in equity. Judge Keith reviewed the authorities on the subject at length, and then stated the conclusions of the court in terms which, by necessary inference, show that the account involved in the instant case is not such as to authorize a court of equity, even under the wide discretion belonging to it in matters of account, to assume jurisdiction. The pertinent language of the opinion in the case cited is this: "The principle we have undertaken to illustrate is not that the court of law has not jurisdiction in such a case to afford a remedy, but that the remedy afforded at law is not as full, adequate and complete as that given in equity. The text-writers and adjudicated cases which we have examined show how wide is the scope of equity jurisdiction in such cases, and while we have found none precisely in point, all we think tend to illustrate the general proposition. Whether the authorities cited refer to mutual accounts, to long and intricate accounts to repeated and aggravated trespass, or to the investigation of a contract embracing a multitude of terms all converge upon and illustrate the essential proposition that a court of equity will interpose, even in the class of cases where courts of law have concurrent jurisdiction, and without the existence of a specific ground of equity, whenever it appears that the

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remedy at law is less adequate than that in equity to do full and complete justice between the parties; and it, therefore, follows that each case must be determined upon its own merits. The usual course of the administration of justice is not lightly to be diverted from courts of law, where as a rule it rightfully belongs, but whenever it shall clearly appear that the remedy at law is inadequate to do justice between the parties, the jurisdiction of a court of equity may be invoked.

"It is to be regretted that the bill and exhibits filed with it in this case are so voluminous as to render it undesirable to report them in full. If it were done there could be little room for doubt that the case before us is one for the exercise of equitable jurisdiction in order to do justice between the parties."

The bill in *Oglesby & Co.* v. *Ould & Co.*, showed that the case was "one for the exercise of equitable jurisdiction in order to do justice between the parties," whereas in the instant case the bill, though long and involved in its allegations, shows upon analysis just the opposite situation.

There is no relationship of parties in this case upon which to base what is known as a true bill of account, and no contention is made that the suit belongs to that class. The demand is purely legal and no discovery is necessary. No mutual or complex account is involved. No other equitable ground, incidental to the main relief sought, exists to give color to the jurisdiction. Under these circumstances, it may be safely said that the authorities uniformly deny the right to sue on the account in equity. Lile's Notes on Equity Jurisp. (1921) pp. 264-271; *Oglesby & Co.* v. *Ould & Co., supra; Goddin* v. *Bland & Bro.*, 87 Va. 706, 709; *Poage* v. *Wilson*, 2 Leigh 490; 3 Pom. Eq. Jurisp. sec. 1421.

This conclusion is not affected by the large number of defendants named in the bill, because no complexity in the account arises from that source. There is a general aver-

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ment that the defendants are jointly and severally liable "for the full value of all the said manganese mined and removed from complainants' said lands," but the facts specifically alleged demonstrate that this is not true, and that such liability as is shown against any of the defendants is several and not joint. Suffern is not made a party. The charges as to the interest of Williams, Farrier and Hale are altogether too vague and indefinte to afford a basis of liabliity against them, either at law or in equity. It must be assumed that these charges, the sufficiency of which was expressly challenged by written demurrer, could not be amplified, because the complainants declined the court's offer to allow them to amend the bill. No recovery is sought against the Camp Manufacturing Company or the Bland County Lumber Company. Stange and wife and the Stange Mining Company are treated by complainants as one and the same. The case is thus reduced to two separate legal causes of action for separate trespasses, one against B. T. Johnson, Jr., and the other against Stange and his associates, each independent of the other and properly and conveniently enforceable at law. The account against each of these defendants is a simple one, and could be readily presented in a jury trial.

(3) It is insisted in argument that the jurisdiction in equity ought to be maintained in order that complainants may be "subrogated to the rights of the Camp Manufacturing Company for any money received from ore removed from their land by the defendants, which was paid to the Camp Manufacturing Company on the lien which it held on the large boundary of land for purchase money."

No theory of subrogation is suggested either in the body of the bill or in the prayer for relief, nor do we find any basis for it in the facts alleged. The benevolent doctrine of subrogation has always been recognized and enforced in the courts of this state with marked favor and liberality

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but there is nothing in this case calling for its application. This is at once apparent from a definition of the principle, which is thus formulated in Lile's Notes on Equity Jurisprudence (1921) p. 164: "Whenever one person is compelled to pay a debt or discharge an obligation *for which he is only secondarily liable, in person or in property*, and hence has *recourse over against the person or the property primarily liable*, for exoneration or contribution, a court of equity will subrogate the person thus secondarily liable to the position of the *creditor whom he has satisfied*, as to every *lien, preference or other special advantage* possessed by the latter at the time of such payment." While the principle does not rest in contract, either express or implied, it does depend upon a relationship of principal and surety, or of primary and secondary liability, or a situation in which one person is compelled, even though only for his own protection and without obligation to another, to pay some other person's debt. Stange on Suretyship, p. 462, 463. No such relationship, so far as complainants are concerned, here exists, but merely one of debtor and creditor between the complainants and the trespassing defendants. The funds paid to Camp Manufacturing Company by Johnson and by Stange and associates were in no sense trust funds. The latter, not being wilful trespassers, were the owners of the proceeds of the ore. Whatever sums were paid to the Camp Manufacturing Company, whether from sales of ore or from other sources, increased the beneficial interest of Johnson in the larger boundary of land, and this interest will be subject to the lien of such judgment as complainants may obtain for the value of the ore taken by Johnson; but upon no principle justified by the facts alleged in this case can the complainants be subrogated; *pro tanto*, to the lien of the Camp Manufacturing Company for purchase money on the land.

(4) As the last reason for invoking jurisdiction in

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equity, it is claimed that this course is necessary to avoid a multiplicity of suits.

This ground of jurisdiction is not specifically referred to, or even very definitely suggested in the allegations of the bill, or in the prayer for relief. It may have come to the surface in this litigation in answer to one of the grounds of demurrer, namely, that the bill, if otherwise maintainable, was bad because it sought a recovery against several and separate tort feasors for separate and distinct demands.

Many authorities are cited by counsel for the complainants which fully support the general doctrine that equity will assume jurisdiction to avoid a multiplicity of actions. We need not enter into a discussion of the several classes of cases to which this doctrine applies. With respect to most of them, the authorities are fairly uniform, and the doctrine involves little difficulty. If this case falls within any of the classes recognized by any of the authorities, it falls within the class as to which the authorities are in a state of great conflict and confusion. We refer to the fourth and last class described by Mr. Pomeroy, in the course of his admirable and exhaustive treatment of the subject, as follows:

"Where the same party, A, has or claims to have some common right against a number of persons, the establishment of which would regularly require a separate action brought by him against each of these persons, or brought by each of them against him, and instead thereof he might procure the whole to be determined in one suit brought by himself against all the adverse claimants as co-defendants." 1 Pom. Eq. Jurisp. 2nd Ed., sec. 245.

Mr. Pomeroy follows up this statement of his fourth class of cases in which the equitable jurisdiction may properly be invoked by a critical review of the authorities, and by a learned discussion of the subject, in which, with charac-

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teristic earnestness and ability, he leads to a conclusion stated thus in section 269: "The jurisdiction, based upon the prevention of a multiplicity of suits, has long been extended to other cases of the third and fourth classes, which are not technically 'bills of peace,' but 'are analogous to' or 'within the principle of' such bills. Under the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasions of property rights, violation of contract obligation, and notwithstanding the positive denial by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title,' nor 'community of right' or 'of interest in the subject matter,' among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body."

The fourth class recognized by Mr. Pomeroy was adopted, in its full literal scope, and his conclusions vindicated in all substantial particulars, by the Supreme Court of Alabama in the case of *Southern Steel Company* v. *Hopkins, et al,* 157 Ala. 174, 20 L. R. A. (N. S.) 848, 131 Am. St. Rep. 20; but this case was later overruled in *Roanoke Guano Co.* v. *Saunders,* (Ala.), 35 L. R. A. (N. S.) 491, and the decision in the *Hopkins case* was itself, on a subsequent appeal, reversed. See *So. Steel Co.* v. *Hopkins,* 57 So. Rep. 11, 40 L. R. A. (N. S.) 464. The trend of judicial decision is toward confining the jurisdiction within narrower limits than would be permitted by Mr. Pemeroy's views. See Lile's Notes on Equity Jurisprudence (1921) p. 256; 10

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R. C. L. p. 284, sec. 29; Notes: 131 Am. St. Rep. 42; 40 L. R. A. (N. S.) 465; Ann. Cas. 1914B, 697.

We do not find it necessary to do more than merely advert to this conflict between Mr. Pomeroy and many of the courts, because that conflict seems to be largely reconciled, so far as this case is concerned, by section 251½ of the 3rd Edition of Pomeroy's Equity Jurisprudence, wherein it is said that the equity suit may result in a simplification or consolidation of the issues; that if, after numerous parties are joined, there still remain separate issues to be tried between the several parties, nothing has been gained by the court of equity's assuming jurisdiction; and that in such a case, while the bill has only one number on the docket and calls itself a single proceeding, it is in reality a bundle of separate suits, each of which is no doubt similar in character to the others, but rests nevertheless upon separate and distinct liabilities. Under this interpretation, even the liberal rule of jurisdiction contended for by Mr. Pomeroy would exclude the instant case.

It must be remembered, too, that while the particular number of actions which will support this ground of equity jurisdiction is not fixed, and depends upon the circumstances of each case (21 C. J. 75), the very foundation of the jurisdiction is the inadequacy of the legal remedy arising out of a *multiplicity* of actions. We have here a prospect of two simple actions at law by the complainants, one against B. T. Johnson, Jr., and the other against Stange and associates, to recover the value of the ore respectively removed by them for 86.8 acres of the original Byrnes land. We are aware of no authorities which would warrant us in declaring this to be the prospect of a multiplicity of suits.

The demurrer to the bill was properly sustained.

(5) Finally, it is assigned as error that the court dismissed the bill instead of transferring it to the law side of the docket.

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Section 6084 of the Code is as follows: "No case shall be dismissed simply because it was brought on the wrong side of the court, but whenever it shall appear that a plaintiff has proceeded at law when he should have proceeded in equity, or in equity when he should have proceeded at law, the court shall direct a transfer to the proper forum, and shall order such change in, or amendment of, the pleadings as may be necessary to conform them to the proper practice; and, without such direction, any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit or action was not brought on the right side of the court. After such amendment has been made, the case shall be placed by the clerk on the proper docket of the court and proceed and be determined upon such amended pleadings. The defendant shall be allowed a reasonable time after such transfer in which to prepare the case for trial."

This statute appeared for the first time in the Code of 1919. It was to some extent modeled after the Act of Congress approved March 3, 1915, Judicial Code 274a, 38 Stat. 956, Barnes' Federal Code, sec. 1049, which was as follows: "That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

It will be observed that the revisors did not adopt the above section of the Act of Congress in its entirety, and

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it was manifestly not their idea to place upon the trial courts in Virginia as great a burden in respect to the reformation of the pleadings as is perhaps imposed upon the Federal courts by that act. Section 6084 of the Code, as we construe it, was intended primarily for the benefit of plaintiffs and is mandatory upon the trial courts only to the extent of prohibiting them from dismissing a case "simply because it was brought on the wrong side of the court" —that is, where the only question was as to the forum. In this case the court did not dismiss the proceeding simply for that reason, but because after complainants had been offered and had rejected the privilege of amending their pleadings, they signified "their intention to stand by their bill, and not to amend the same," and made "no motion to remand this cause to the law side of the court as to any of the parties defendant." The court need not under such circumstances compel plaintiffs to accept the benefit of this statute. Its provisions may be so waived by parties entitled to invoke them as to preclude reliance upon it on appeal, and the language of the decree justifies the inference that it was so waived in this instance.

Furthermore, it was clearly right to dismiss the suit as to all parties except Johnson and Stange and associates; and, since two separate actions must be brought against these parties, a transfer of the cause to the law side of the court with directions to reframe the pleadings would have little, if any, advantage over dismissing the suit without prejudice, which, in effect, was what the court did. In no just sense can it be said that the suit was dismissed "simply because it was brought on the wrong side of the court."

We find no error in the decree complained of, and it must be affirmed.

Affirmed.

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GOOCH, ET AL., *v.* GOOCH, ET ALS.

(*Staunton, September 21, 1922.*)

1. WILLS. — Codicil—Holograph—Disregarding Printed Portions—Attestation Clause—Harmless Error—Republication of Will—Effect of Birth of Child—Codicil—Statement in Form Required to be Filled by Applicant for Degree in Masonry—Code, secs. 5234, 5242, 5229.

Appeal from Corporation Court of city of Roanoke.

Affirmed.

Poindexter, Hopwood & Poindexter, for the appellants.

Woods, Chitwood, Coxe & Rogers, for the appellees.

On May 17, 1909, Garrett G. Gooch, Jr., who then had no child living, executed his will of that date in due form, by which he devised and bequeathed to his wife, Loulie M. Gooch, one of appellees, all of his property, real and personal, without making any provision for any child he might thereafter have.

The witnesses who attested this will were E. W. Poindexter and A. C. Hopwood, two attorneys in Roanoke, Va. In 1911 one of appellants, Garrett G. Gooch, III, was born, and in 1916 the other of appellants, Marcia Morton Gooch was born. Following the testator's death the said will was found among his private papers, was duly admitted to probate on January 26, 1920, and the appellees qualified as administrators c. t. a.

The bill filed by appellants, claims that, as said children survived the testator, the said will is embraced within the operation of the statute making provision for pretermitted children, (Code 1887, sec. 2527, now contained in Code 1919, sec. 5242), unless the writing presently to be mentioned signed by the said testator after the birth of the

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children constituted, as the appellees claim, a codicil to the said will, and "an intention to revive the same is shown" within the meaning of the statute, (Code 1887, sec. 2510, now contained in Code 1919, sec. 5234).

The first mentioned statute, (Code 1919, sec. 5242), so far as material, is as follows:

"If any person die leaving a child * * and leaving a will made when such person had no child living, wherein any child he might have is not provided for or mentioned, such will * * * shall be construed as if the devises and bequests therein had been limited to take effect in the event that the child shall die under the age of twenty-one years, unmarried and without issue."

The second mentioned statute, (Code 1919, sec. 5234), is as follows

"No will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown."

The manner in which wills or codicils are required to be executed, referred to in the statute last quoted, is, so far as material, provided for in the statute, (Code 1887, sec. 2514, now Code 1919, sec. 5229), as follows:

"No will shall be valid unless it be in writing and signed by the testator * * in such manner as to make it manifest that the name is intended as a signature:"—then follow provisions requiring the signature to be made, or the will acknowledged by the testator, in the presence of at least two competent witnesses, etc., "unless it be wholly in the handwriting of the testator."

The material facts appearing in evidence in the record are as follows:

The writing which the appellees, as aforesaid, claim constituted a codicil, having the effect aforesaid under what

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is now section 5234 of the Code of 1919, was signed on April 23, 1919, delivered to a certain custodian and subsequently held by the latter, under the circumstances now to be mentioned.

On April 23, 1919, the said testator was a candidate for initiation into the Fifth Degree of the Order of Scottish Rite Masonry. As shown in evidence, every member of that order is obligated to see that the testamentary disposition of their property by deceased members "are carried out in so far as they legally may" and, to that end, it is a rule of the order that every candidate for the degree mentioned shall, at the time of his initiation, have in existence a will, which expresses the testamentary intent of the candidate, existing at that time, with respect to the disposition of the property he may leave at his death; and that rule requires that every candidate for such degree shall, if no such will is already in existence at such time, execute, before initiation, his will, upon a printed form therefor furnished the candidate by the order, which printed form is as follows:

"IN THE NAME OF GOD, AMEN! I .... being of sound mind and memory, but knowing the uncertainty of human life, do now make and publish this my last will and testament, that is to say:

..... (SEAL).

"Signed, sealed, published and declared by the said ...., the testator, as and for his last will and testament; and we, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses thereto, this.....day of..... A. D. 19....

.....
.....
.....".

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Before the initiation of the testator he was furnished by the secretary of the Lodge with certain printed instructions, among which was the following:

"Write now in good faith, your last will and testament, precisely as if you were about immediately to be engaged in battle and expected to fall in the action,"—followed by the note,—"(A legal form should be provided for the candidate)."

At the same time the testator was, by the said secretary, furnished with a copy of the aforesaid printed form and instructed that "if a will had been previously made he (the testator) could so state the fact in the form given him, and that would be all that was necessary, but, if no will had been previously made, he must make out one, as the Scottish Rite Masonry required every individual joining the Rite to execute a will, otherwise he would not be permitted to advance further in the order." The secretary further instructed the testator at that time that if the latter "already had a will *in existence* it would be not only necessary for him to so state on the printed form * * , but also to sufficiently identify the will *so that it could be located at the time of his death.*" (Italics supplied).

Thereupon the testator, after the words "that is to say," in the printed form, wrote, all in his own handwriting, the following:

"My will is made in favor of my wife, Loulie M. Gooch, duly signed and filed.

"Witnessed by:

E. W. Poindexter and

A. C. Hopwood

Attorneys in Roanoke, Va.,"

and signed his name on the blank line opposite the word "(SEAL)" on the printed form, as follows: "G. G. Gooch, Jr.:" and wrote his name, "G. G. Gooch, Jr." in the blank therefor in the printed form aforesaid of the attestation

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clause, and filled in the blanks therein left for the date with "23rd," "April," and "9,"—making the attestation clause read as follows: "Signed, sealed, published and declared by the said *G. G. Gooch Jr.*, the testator, as and for his last will and testament; and we, at his request, and in his preence, and in the presence of each other, have hereunto subscribed our names as witnesses thereto this *23rd* day of *April 1919.*" The portion thereof which is in the handwriting of the testator being in italics.

Whereupon the testator delivered the paper to the said secretary, who filed it among the records of the Lodge, as he was required to do by the rules of the order. There this paper remained until after the death of the testator.

On September 20, 1920 on motion of the aforesaid administrators c. t. a. in an *ex parte* proceeding, so much of the last named writing as was all in the handwriting of the said testator, together with the attestation clause with the blanks therein filled as aforesaid, was admitted to probate as a codicil to the aforesaid original will.

In October 1920 the instant suit was instituted, the bill filed by appellants alleging substantially the aforesaid facts, and praying that the operation of the said original will be declared suspended by reason of the birth of the infant complainants, the said infant appellants; that the said latter writing be declared of no binding force or effect; and that the said *ex parte* order of court of September 1920, admitting such writing to probate as a codicil to said original will, be set aside and annulled.

The record discloses that the suit was instituted in behalf of the infants at the request of their said mother in order that the interests of such infants might be properly protected; and the positions taken by the appellees in the cause were taken merely for the purpose of raising the questions of law arising upon the facts for the determination of the court; and the depositions of witnesses were taken and

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read in evidence, developing in the facts, solely for that purpose.

The court below directed an issue out of chancery to be tried by a jury at the bar of the court, and there was a verdict of the jury upon that issue finding, in substance, that the later writing aforesaid was a codicil to the original will aforesaid and that such will and codicil constituted the last will and testament of the said testator.

The decree under review was thereupon entered, which contains the same holding as the verdict of the jury, and dismissed the suit, thereby declining to interefere with the aforesaid *ex parte* action of the court admitting the original will and codicil to probate and approving of that action.

In this decree the following conclusions of the court are stated, namely:

That the aforesaid paper of which the portion in the hand writing of the testator is held to be a codicil, as aforesaid, "although not witnessed, is a sufficient compliance with the formal requisites for the execution of a will, since the printed portions thereof may be disregarded and stricken out as surplusage, leaving a holograph will complete and entire in itself;" and

That such will (or codicil) "was executed (by the testator) under circumstances sufficiently recognizing and identifying his original will of May 17, 1909, and indicating a continuance of testamentary intent by which he was actuated in executing said original will."

SIMS, J., after making the foregoing statement, delivered the following opinion of the court.

The assignments of error do not challenge the correctness of the decree under review in its holding that the printed portions of the form on which the writing was found, which is held to be a codicil to the original will, may be disregarded, leaving that portion of the writing which is wholly in

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the handwriting of the testator and signed by him, (namely: "My will is made in favor of my wife, Loulie M. Gooch, duly signed and filed. Witnessed by E. W. Poindexter and A. C. Hopwood, Attorneys in Roanoke, Va.

G. G. Gooch, Jr."),

complete and entire in itself, and that this holograph writing was a testamentary act, so that the writing was properly admitted to probate as a holograph codicil to the original will. And the following authorities, cited in the petition and in the brief of counsel for appellees, fully sustain the correctness of these conclusions: 28 R. C. L. sec. 155, p. 197; 1 Redfield on Wills (4th ed.), p. 6; *Pollock* v. *Glassell*, 2 Gratt. (49 Va.) 439; *Perkins* v. *Jones*, 84 Va. 358; bearing upon the testamentary character of the writing; 40 Cyc. 1130; 1 Alexander's Com. on Wills 650; 28 R. C. L., sec. 116, pp. 161-2; Note in 20 Ann. Cas. 370; *Baker* v. *Brown*, 23 Miss 739, 36 So. 539, 1 Ann. Cas. 370; touching the subject of the immateriality of the printed portions of the writing. See also *In re Walcott*, (Utah), 180 Pac. 169, 4 A. L. R. 727; *In re Robertson's Succession*, 49 La. Ann. 868, 21 So. 586, 6 Am. St. Rep. 672; *In re Plumel*, 151 Cal. 77 90 Pac. 192, 121 Am. St. Rep. 100; and *In re Noyes*, 41 Mont. 190, 105 Pac. 1017, 26 L. R. A. (N. S.) 1145; on the subject of when a paper partly printed and partly written cannot be held to be holographic.

The action of the court, in admitting the attestation clause to probate, was erroneous, as there is no portion of this altogether in the handwriting of the testator which is complete and entire in itself. But this is not assigned as error, and was, indeed, harmless error.

Upon the subject of the finalty of the testamentary intention expressed in the codicil, *Perkins* v. *Jones*, just cited, is in point. It is true that that case was decided by a divided court of three judges, and that the dissenting opinion of Judge Lewis is an able one. But the instant case is much

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stronger than that to support the holding that the codicil evidences the final testamentary intention of the testator. In that case there was no evidence *aliunde* explaining, consistently with the finality of the testamentary intention, the failure to use the attestation clause found at the foot of the writing, and the decision was based solely on the evidentiary effect to be given the signature under the statute of wills. Whereas in the instant case the failure to use the attestation clause is fully explained by the evidence touching the purpose of the execution and the delivery of the writing.

It should be also noted in passing, that it is settled, upon facts such as are involved in the instant case, that on the birth of the children, the original will became, and, during their minority, continued, inoperative, (*Wood* v. *Tredway*, 111 Va. 526), unless and until it was revived after the birth of the children.

The following question, however, is presented for our decision by the assignments of error, namely:

1. Does it appear in evidence in this cause, on the face of the codicil, or otherwise, that the testator intended a republication of his original will at the time the codicil was executed, so as to bring the codicil within the statute, section 5234 of the Code above quoted, and thus make it operate to revive the original will after the birth of the children?

This question must be answered in the affirmative.

When the codicil is read in the light of the sole purpose for which the codicil was executed, shown in evidence, namely, in order to express the testamentary intention of the testator existing at the time of such execution, what is said in the codicil carries with it the plain and, indeed, irresistible inference or implication that it has the meaning that the original will expressed the testamentary intention of the testator existing at the time the codicil was

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executed, and that that intention extended to the provisions of the original will as a whole, and not merely to a part of it. It is thus "shown," (to use the language of the statute just referred to), by the evidence in the cause, that the codicil in question intended to revive the whole of the original will, so that the codicil, under such statute, operated to revive the whole of such will after it had been, under section 5242 of the Code, also above quoted, revoked, conditionally or contingenly, by the birth of said children.

It is admitted in the brief for appellees that such would have been the effect of the codicil prior to the statute aforesaid, (sec. 5234), on the subject of the revival of wills which have been in any manner revoked. It is admitted that the holding in *Corr* v. *Porter*, 33 Gratt. (74 Va.) 278, and *Hatcher* v. *Hatcher*, 80 Va. 169, (which were cases which involved codicils executed prior to such statute), is correct as applicable to the wills involved therein. That holding as expressed in the opinion in *Corr* v. *Porter*, at p. 282 is as follows:

"There is some conflict among the authorities upon the proposition, whether a codicil, *proprio vigore, independently of an expressed or implied intention,* operates as a republication, *or whether it must appear, on the face of the codicil or otherwise, it was so intended.* It has been settled * * by a long train of decisions that no particular words are necessary to constitute a republication. All that is necessary is, that it shall appear that the testator considered the paper" (the original will) "as his will at the time he made the codicil. Anything is sufficient which indicates a continuance of the testamentary intent with respect to the disposition of the testator's property. * * * Where the testator in the codicil refers to the will and gives sufficient demonstration that when making the codicil he considered the will as his will, there a republication may be implied." (Italics supplied).

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The same holding, in substance, as expressed in the opinion in *Hatcher* v. *Hatcher*, is as follows: "The codicil, it is admitted, operates as a republication of the will, and the effect of the republication is to bring down the will to the date of the codicil, so that both instruments are to be considered as speaking at the same date and taking effect at the same time."

It is contended, however, that, because of the statute last referred to, there is a difference between the republication of a will which has never been revoked and the revival or republication of a will which has been in any manner revoked; and the case of *Francis* v. *Marsh*, 54 W. Va. 555, 46 S. E. 578, 1 Ann. Cas. 665, is cited in support of that position. That case involved the West Virginia statute, which is the same as said sec. 5234, under which a will once in any manner revoked can be revived by codicil "only to the extent to which an intention to revive the same is shown. And in that case *Corr* v. *Porter* and *Hatcher* v. *Hatcher* are reviewed and held to have involved the republication of an existing will, not the revival of a revoked will, and to have been governed by the common law, as the codicils therein involved were executed prior to 1850, when the Code of 1849 of Virginia went into effect,—in which Code this statute seems first to have appeared,—and it is said, in *Francis* v. *Marsh* that, under the statute just mentioned, —"The difference between republication of an existing will, and revival or republication of a revoked will by a codicil is that in the latter case the codicil must show an intent to revive, while in the former it need not." But, as appears from an examination of the able opinion in that case, which contains an instructive review of the authorities, it holds, as correctly set out in the head note, that any language in the codicil "from which such intent may reasonably be inferred, such as a reference to the will by date. * * * * in the absence of contradictory matter found on the face

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of the codicil or in the surrounding circumstances, is sufficient."

In *Francis* v. *Marsh* the original will involved was revoked by marriage; (of which result, we may remark, parenthetically, the testator was shown to have been unaware). The testator subsequently executed the following codicil. "I, John Marsh, do make this a codicil to my will made on the 6th day of August, 1895," (that being his original will), "and do nominate and appoint J. D. Watson as one of the executors of my will and do hereby revoke the appointment of J. R. Jewell to said will." And the court held that the effect of the codicil, under the statute, was to revive the whole will. That holding is in entire accord with the views we have expressed above, since the intention to revive the whole of the original will referred to is plainly implied by what is said in the codicil; only in the case before us there is parol evidence by which the intent in question is "shown" *impliedly*, even more clearly.

It was the settled rule at common law that if it appeared *on the face of the codicil or otherwise*, whether *impliedly or expressly*, that the codicil was intended to revive the original will, it had that effect. The conflict in the authorities, referred to in *Corr* v. *Porter*, *supra* (33 Gratt. at p. 282), was not on that subject, but whether, where such intention did *not* appear *on the face of the codicil or otherwise, either expressly or impliedly*, "a codicil, *proprio vigore*, * * * operates as a republication * * ." We think that the statute merely adopted the settled rule at common law; and, by the concluding provision, to the effect that a revoked will shall be revived by the common law method, "only to the extent to which an intention to revive the same is shown," we think the statute merely meant to settle the aforesaid conflict in the authorities, by providing a statutory rule that a codicil shall not operate, *proprio vigore*, to revive a revoked will where the intention

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so to do does *not* appear, on the face of the will, or otherwise, either expressly *or impliedly*, but shall revive such a will "only to the extent to which an intention to revive the same is shown," either *impliedly or expressly*, by the codicil, when read in the light of all the evidence admissible on the subject.

As to what evidence is admissible on such a subject, this is said in *Pollock* v. *Glassell, supra,* (2 Gratt. at p. 458): "Neither the delivery of a deed, nor the publication of a will, is a part of the instrument; they both lie in parol, and yet they are legitimate and important matters in the proof of its execution * * ;" and such proof is held to be admissible in evidence.

It is not necessary to a revival of a revoked will, by a codicil thereto, that the codicil should show that the testator knew that his will had been revoked; the essential thing to be shown by the codicil is that, as expressed therein or to be implied therefrom, the codicil conveys the meaning that the will still expresses the testamentary intention of the testator as of the time of the execution of the codicil and to what extent the will still expresses that intention, whether to the extent of the whole will, and if not, to what extent. *Francis* v. *Marsh, supra,* (1 Ann. Cas. 665; Note 1917D Ann. Cas. 1176.)

The fact that the testator did not intend the language used in the codicil to operate as a codicil is immaterial. As said in *Pollock* v. *Glassell, supra,* (2 Gratt. at p. 455-6): "There is nothing that requires less formality than the body of a will or testament. If it be duly signed, attested and published, it may assume almost any form, provided it be intended by the party to take effect after his death. * * Nor is it necessary that the testator should intend to perform or be aware that he has performed a testamentary act. * * * It is therefore well settled that the form of a paper does not affect its title to probate, provided it

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be the intention of the deceased that it should operate after his death. It is contended, however, that this intent must appear upon the face of the instrument and can never be proved by parol. This would perhaps be true if it were a naked question of intent; but it is something more. The true question is whether the deceased has done a testamentary act; and that involves * * * * * , not merely the terms, but also the perfect and appropriate execution of the instrument; and the latter is the proper subject of parol evidence."

It is also argued on behalf of the appellants that a will once revoked by marriage, or by the birth of a child or children, can be revived only by a valid re-execution; that mere subsequent recognition by a codicil will not revive the revoked will; and the following authorities are cited to sustain such position, namely: 28 R. C. L. sec. 152, p. 194; *Stewart* v. *Mulholland,* 88 Ky. 36, 21 Am. St. Rep. 320; and *Bohannon* v. *Walcot,* (Miss.), 29 Am. Dec. 631.

In the first place, this position ignores the provision of the statute that a revoked will may be revived by a codicil, as well as by a re-execution of the revoked will. Further:

The statement in the text of 28 R. C. L. just mentioned, which is quoted in the petition for the appeal, is that, "A will once revoked by marriage can only be revived by a valid re-execution. Mere subsequent recognition will not revive it," and the text refers to *Stewart* v. *Mulholland,* also just mentioned, to support the text. The head note of the latter case sustains this test, and, seemingly, so does a statement in one part of the opinion. But when the whole of the opinion on this subject is read it is clear that all it means to say is merely that the *verbal declarations* of the testatrix made after her marriage recognizing a will made prior to and revoked by her marriage, did not constitute a republication of such will under the Kentucky statute on the subject of the revival of revoked wills, (which is t

same as the aforesaid Virginia statute on the subject). The reason for such a holding is obvious. The case last mentioned, as cited for appellants, of *Bohannon* v. *Walcot*, concerns revocation only, and does not involve the subject of revival or republication of wills.

The decree under review will be affirmed.

Affirmed.

GRIMSLEY, TRUSTEE, ET ALS., *v.* GIBSON, ET ALS.

(*Staunton, September 21, 1922.*)

1. DEEDS.—Trust—Construction—Amount Secured.

Appeal from Circuit Court of Russell county.

Reversed.

Grimsley & Miller and *Jackson & Henson*, for the appellants.

J. E. Duff and *Finney & Wilson*, for the appellees.

PRENTIS, J.:

The appellants, T. E. Grimsley, trustee, and E. M. Funkhouser and J. W. Albert, who are creditors of Gibson, whose debts were secured by a certain deed of trust upon land in Culpeper county, complain of a decree by which it was adjudged that the amount of the debts thus secured amounted in the aggregate to $23,225, instead of the sum of $51,925, as claimed by the appellants.

There was a general creditors' suit instituted by certain judgment creditors of H. C. Gibson, in which, among other things, it was alleged in the bill that the principal sum due under the deed of trust of November 1, 1919, upon

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the tract of land in Culpeper county to T. E. Grimsley, trustee, was to secure the payment of certain notes described therein for the principal sum of $51,925, "which will more fully and at large appear by reference to said deed of trust," which was filed as an exhibit with the bill. There was a decree referring the cause to a commissioner to ascertain and report the liens by judgment or otherwise upon all of the lands of the judgment debtor, as well as that in Russell as in Culpeper county, Virginia. Apparently because there was no issue raised as to the amount of the debt secured by the deed of trust, Grimsley, trustee, was authorized to execute it by selling the property. Within three days from the time this decree of reference was entered, the commissioner made a report of the liens, and among other liens reported that the debt secured by the deed of trust to Grimsley amounted to only $23,225. He reached this conclusion, notwithstanding the allegation of the bill, because of his construction of the language of the deed which will be hereafter quoted. There were no exceptions to his report and it was confirmed. Thereafter, when these appellants were advised of the facts just recited, they promptly filed a petition for rehearing, which in substance alleged that inasmuch as the amount claimed to be secured by the deed of trust was admitted by the bill, they paid no attention to the proceedings before the commissioner in chancery, were taken by surprise and knew nothing of his conclusion until long after the confirmation of the report. They asked that the decree of confirmation be reheard, and that their petition to rehear be treated as an exception to the report, and prayed that the court would by decree fix and determine the amount of the debt at $51,925, representing unpaid purchase money for the land in Culpeper county in accordance with their claim. The appellees, judgment creditors of Gibson, who were also complainants in the original bill, demurred to the said petition. Upon the

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hearing the court sustains that demurrer and confirmed the construction which the commissioner had placed upon the provision in the deed of trust which is involved, holding that as between themselves and the other lien creditors of Gibson the debt thereby secured was the smaller amount, and that no contradictory evidence could be introduced.

The clause in the deed of trust thus construed reads: "To secure the prompt payment of the following notes: All bearing date as of November 1st, 1919, with interest from date, payable annually, drawn by H. C. Gibson to the order of J. W. Albert for the following amounts, and payable at the following times: One note for $1,765.00, one for $5,410.-00, and one note for $8,875.00, payable one year after date; five notes for sum of $7,175.00, payable in two, three, four, five and six years after date, respectively."

The question arises as to the five notes payable in two, three, four, five and six years after date. The trial court construed the language used as securing five notes aggregating $7,175, whereas the contention of the appellants is that the deed secured five notes each for the sum of $7,175. A careful scrutiny of the language is therefore necessary in order to determine which of these two conflicting views is correct.

We observe, in the first place, that the draftsman of the deed undertook to draw an instrument to secure the payment of certain notes, intending immediately thereafter to describe them, as appears in the first clause by the use of the words, "the following notes." Then, in the second clause, after giving the date, providing for interest thereon, and that it should be payable annually, he uses the words "for the following amounts and payable at the following times," as descriptive of the notes which are to be secured,—*i. e.*, he intended immediately thereafter to state the amount of each note and the time of its maturity. Then in the concluding clause it appears that there are, in ad-

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dition to the three previously described, five other notes. There being five such other notes, then their aggregate is greater than $7,175, unless the draftsman changed his apparent purpose to state the amount of each of the notes to be secured by the deed of trust. If he adhered to his purpose of stating the amount of each note, indicated by the words "following amounts," then he did not intend merely to state the aggregate thereof. If there were five notes aggregating the sum of $7,175, how is it to be determined from the language of the deed when each or any one of these five separate notes is due, for, as clearly expressed by the clause, they are payable annually in two, three, four, five and six years after date? The commissioner and the court reached their conclusion, as we think, by putting undue emphasis on the word "sum" in the clause, "five notes for the sum of $7,175." The definition of the word "sum" relied upon, is correct—that is, its primary meaning is "the aggregate of two or more things taken together; whole; total; quantity of money." The word "sum", however, as here used, must be construed in connection with the context. So considered it seems to us clear that if the draftsman had intended to provide that the aggregate sum of the five notes was $7,175, he would have said so distinctly, and also stated whether the five notes were equal or unequal in amount. If unequal it may be assumed that the amount of each would have been stated with the date of maturity of each within the six years during which all were payable. If equal in amount, however, the date of the maturities is sufficiently stated. When the context is thus considered, we are unable to agree with the learned judge of the trial court. We think it is fair to say that the draftsman, by the language used, intended to say that among the several notes which were secured by the deed there were five equal in amount maturing one each year in from two to six years after date, and that each of them was for the sum of $7,175.

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In the absence of parol evidence (and we have none here) we are of opinion that the trial court has misconstrued the provision, and that its true construction is, as was in substance alleged in the complainants' bill, that there were five notes, each for the sum of $7,175. Our conclusion then is that the demurrer to the petition for rehearing should have been overruled, and that the appellants should have been permitted to except to the commissioner's report. The court should have thereupon ascertained the true amount of the debt secured by the deed of trust to be the principal sum of $51,925. This court will accordingly so decree.

Reversed.

HAWTHORN COAL CORPORATION *v.* BLAIR, ET AL.

(*Staunton, September 21, 1922.*)

1. CONTRACTS.—Principal and Agent—Authority of Agent—Employment of Labor—Knowledge by Employee of Agent's Authority—Instructions.

Error to Circuit Court of Wise county.

Reversed.

O. M. Vicars, for the plaintiff in error.

E. M. Fulton and *J. L. Camblos,* for the defendants in error.

Kelly, P., absent.

This is an action by notice of motion instituted by the defendants in error against the plaintiff in error. The parties will be hereinafter referred to in accordance with their positions as plaintiffs and defendant in the trial court.

The object of the action on the part of the plaintiffs is to recover a certain balance alleged to be due them, by the

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defendant, for certain work done by them for the latter under an express contract, at the price which the defendant is alleged to have promised to pay therefor, to-wit, $3.00 per yard.

There was a trial by jury which resulted in a verdict in favor of the plaintiffs for the sum of $332.45. The defendant moved the court to set aside the verdict because of error in the instruction given to the jury over the objection of the defendant, and for other reasons not necessary to be set forth here. This motion the court overruled; it entered judgment in accordance with the verdict; and the defendant brings error.

The court gave only one instruction, which is the instruction to which the defendant objected as aforesaid, and which is as follows:

"The court instructs the jury that if they believe from a preponderance of the evidence that Collins, the mine boss for the defendant, had the authority to make contracts for the mining of coal, but did not have the authority to make the contract in question, yet if you further believe from the evidence the defendant knew that Collins had made the contract with the plaintiffs, and the defendant accepted the work, believing that the terms were $2.00 per yard instead of $3.00 per yard, and paid for it, or paid for part of it, and you further believe the work done by the plaintiffs was reasonably worth the price Collins contracted to pay, and you further believe the contract was made in good faith by Collins and the plaintiffs, and not with the intent to defraud defendant, you will find for the plaintiffs and assess their damages according to the terms of the contract; but if you believe the contract was made by the plaintiffs and Collins, the mine boss, with intent to defraud the defendant, you will find for the defendant on the yardage question all over $2.00 per yard."

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The uncontroverted evidence is that Collins, the mine foreman, did not have the authority to contract to pay more than $2.00 per yard for the work; that the defendant had expressly instructed him not to pay more than that for such work; but that Collins, however, finding that he could not get the work done for less than $3.00 per yard, let the work to contract to the plaintiffs and agreed to pay them therefor $3.00 per yard. Knowing, however, that the defendant would not sanction that action on his part, and with the sole motive of getting the work done for the defendant at as low a cost as it could be done for at that time, and without any personal profit or advantage whatever in it for himself, Collins, when he made out and sent to the office of the defendant the pay-rolls from time to time as the work in question progressed, stated the price to be paid for the portions of the work as it was done, which were included in the respective pay-rolls, as being done for $2.00 per yard, but padded or falsified the statement of the yardage by increasing the yardage beyond that actually done, so that the number of yards stated, at the price of $2.00 per yard, would amount to the cost of the actual yardage at $3.00 per yard. Several pay-rolls thus made out were paid by the defendant before it discovered the deception being practiced. Meanwhile the work was completed, and thereupon the defendant paid the plaintiffs in full for the work done at $2.00 per yard, but refused to pay the balance of $1.00 per yard which the plaintiffs claimed was still due them for the work at $3.00 per yard, and the plaintiffs instituted this action to recover such balance.

The plaintiffs, in their testimony, while admitting that they knew that Collins was stating in the pay-rolls the price to be paid them as $2.00 per yard, and was padding the yardage stated in the pay-rolls as aforesaid, so as to make the amount in fact paid them $3.00 per yard, claimed that they did not consider this any of their business; that

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as they had undertaken the work at a fair price of $3.00 per yard, that being as little as it could be done for, and Collins, the mine boss, having agreed to pay them that price, they, therefore, accepted the payments as made them from time to time as per the pay-rolls.

However, upon the crucial question in the case, (namely, whether the plaintiffs knew, at the time they entered into the contract and did the work, that Collins was exceeding his authority in agreeing to pay them over $2.00 per yard), the testimony of both of the plaintiffs is indirect quite vague and inconclusive. Besides, there was the evidence aforesaid with respect to the knowledge of the plaintiffs of how the mine boss was making out the pay-rolls; and there was further express testimony on behalf of the defendant to the effect that the plaintiffs had admitted before the trial, that it was understood in advance between them and the mine boss that the latter was to make out the pay-rolls as he did, which should have been weighed by the jury on such question.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court.

1. Did the court err in giving the instruction it did to the jury?

This question must be answered in the affirmative.

By this instruction the court took away from the jury all consideration of the question of whether the plaintiffs knew, at the time they made the contract under which they seek to recover and did the work, that the mine boss, as agent of the defendant, exceeded his authority in agreeing to pay $3.00 per yard for the work. The instruction, in effect, told the jury that if the price was reasonable and the agent did not intend to defraud his principal, but was acting for what he thought was the principal's best interest, the agent could make a contract for, and thereby

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bind his principal, without authority so to do, and, indeed, directly in violation of his instructions from his principal not to make any such contract, and this although the parties with whom the agent undertakes to contract knew at the time that the agent was acting in excess and in violation of his authority. Such is not the law. To so hold is to destroy all right of legitimate control of one's own business.

Of course, in the absence of knowledge, actual or constructive, on the part of parties entering into a contract with a general agent, (such as the mine boss was in the instant case with respect to employing labor in and about the mine), of any limitation upon the authority of the agent, the parties may safely rely upon the apparent authority of an agent, incident to the position in which the principal has placed him and holds him out as having in dealing through him with third persons. But that is not the situation presented by the instruction aforesaid.

The case must be reversed, and a new trial will be awarded, to be had in accordance with the views above expressed.

Reversed and a new trial granted.

HONAKER LUMBER COMPANY, INC., v. KISER.

(*Staunton, September 21, 1922.*)

1. JURISDICTION.—Trespass on Land—Location of Land.
2. ACTIONS.—Trespass—Ownership of Land—Court Right—Evidence—Measure of Damages—Value of Timber Taken—Evidence—Declarations of Claimant—Res Gestae—Evidence.

Error to Circuit Court of Wise county.

Affirmed.

W. H. Rouse and *Jno. W. Flanagan, Jr.*, for the plaintiff in error.

S. H. & Geo. C. Sutherland, for the defendant in error.

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Kelly, P., absent.

WEST, J.:

George W. Kiser recovered a judgment for $1,000 with interest and costs against Honaker Lumber Company, Inc., for cutting and removing timber and committing other trespasses upon his land. Honaker Lumber Company is here assigning error to that judgment.

For convenience the parties will be designated as plaintiff and defendant, with respect to their positions in the lower court.

Some time prior to the Civil War James Rasnick (sometimes spelled Rasnake) had a survey made of a tract of waste and unappropriated land, then in Buchanan county, containing 215 acres. He had the boundary lines marked, and entered at once upon it, and has lived there ever since, always paying taxes on it and claiming it to the extent of his survey, and farming the land for a living. He built on it two dwelling houses, a smokehouse, barns and other outbuildings and began fencing it before the Civil War, and later one of his fences included the land now in controversy.

After paying taxes on it for about sixteen years, in 1870 or 1871, he went before the court in Buchanan county and obtained a court right, as provided by section 457 of the Code, for the entire tract surveyed, containing 215 acres. His ownership of this land was so notorious that the Legislature of Virginia, in 1880, in the act creating Dickenson county, expressly provided that the county line should run, "thence with the Russell county line to James Rasnick's farm, including said farm in the new county."

The 215 acre tract was claimed by one Warder, under a claim for a large boundary, but he recognized Rasnick's title to the land and offered to buy it several times. Finally, Thomas W. Davis, agent for Warder, offered to convey the Warder title to the land to Rasnick, if Rasnick

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would sell the coal and mineral under and upon said land to the Virginia Coal & Coke Company, and said Davis, agent for George A. Warder, by deed dated March 10, 1888, and recorded in Dickenson county January 12, 1889, conveyed the Warder title to the surface of said 215 acre tract to said James Rasnick.

On December 8, 1887, Thomas W. Davis, agent for George A. Warder, conveyed to Virginia, Tennessee and Carolina Steel and Iron Company a tract of land described as lying in Buchanan county, containing 72 acres, more or less, which included the land conveyed by James Rasnick and wife to Geo. W. Kiser, as a tract of 44½ acres. The said deed of December 8, 1887, was recorded in Buchanan county on January 30, 1888, but never recorded in Dickenson county. It was under this deed that the defendant claimed and cut the timber in 1914. James Rasnick had no notice or knowledge of the deed last mentioned until 1908.

Oliver Rasnick, son of James Rasnick, upon his father's promise to give him the land, cleared up and fenced in a portion of the land now in controversy, and grew cabbage, corn and potatoes on it. James Rasnick afterwards sold to Everett Rasnick a portion of the 215 acre tract, including the land which was cultivated by Oliver Rasnick, he having surrendered the land to his father. Later Everett Rasnick sold this land to the plaintiff, George W. Kiser,

Everett Rasnick having failed to have his deed for the land recorded, to save the extra recordation fees, turned his deed back to James Rasnick for cancellation, with the understanding that James Rasnick and wife would convey the land direct to Kiser. This they did by deed dated September 23, 1897, conveying the land as a tract of land in Dickenson county, containing 44½ acres, more or less, excepting from the operation of the deed the coal and mineral under and upon said land. This tract, by actual survey, contains only 35.5 acres. Later, February 18, 1918,

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Everett Rasnick conveyed his interest in this land to James Rasnick.

James Rasnick sold the poplar trees measuring not less than 20 inches in diameter at the stump from the 215 acre tract, including the 72 acres, to Douglass Lumber Company prior to the time he made the deed to Kiser, and the company removed the timber without objection from anyone.

In May, 1914, the defendant entered upon the 44½ acre tract of land and cut and removed the timber 12 inches and more in diameter, cut timber across plaintiff's fences and destroyed his pasture, built roads and tram roads, damaged the small timber and under growth, and tore up the soil.

The foregoing are among the material facts appearing in the evidence.

The plaintiff relies for title on the Warder title, the court right, and adverse possession. While the defendant denies plaintiff's title and claims it holds the title to the land.

The defendant urges eleven assignments of error.

The first three relate to the action of the court in granting and refusing instructions, and will be considered later.

The fourth assignment is to the action of the court in refusing the motion of defendant to dismiss the suit, because the Circuit Court of Dickenson county had no jurisdiction of the cause of action, which, it is contended, originated in Buchanan county.

This suit was originally instituted in the Circuit Court of Dickenson county, and by consent of parties transferred to the Circuit Court of Tazewell county. Later, on account of the congested condition of the docket, the case was removed to the Circuit Court of Wise county, where it was tried.

It appears from the record that the land, from which the timber in controversy was cut, is located in Dickenson county. It follows, therefore, that the circuit court of that

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county had jurisdiction of the case, and the defendant's motion to dismiss was properly overruled.

The fifth and sixth assignments are to the action of the court in permitting James Rasnick to testify as to what his lawyer did and the fees he paid him with reference to the court right, and in permitting him to testify as to the tax tickets and the payment of taxes.

The defendant was denying the existence of the court right, and plaintiff had the right to prove any fact or circumstances which would tend to sustain his contention that it had been granted to him by the Buchanan court.

A receipt for the payment of money is an admission that the money has been paid, but only *prima facie* proof thereof, and may be rebutted by parol testimony; likewise the fact of the payment may be proven by parol. These assignments are also without merit.

The seventh assignment complains that the court erred in permitting the deed from Everett Rasnick to James Rasnick, dated February 18, 1918, to be received in evidence. The land conveyed by this deed was conveyed to Everett Rasnick by deed from James Rasnick and wife. Later Everett sold the land to the plaintiff, and, in order to save recordation fees, Everett surrendered his deed to James for cancellation, with the request that he make a deed conveying the land to the plaintiff. Without the execution of the deed complained of, the plaintiff was the owner of the equitable title and could have maintained this action. Under these circumstances, the defendant was not prejudiced by the introduction in evidence of the deed of February 18, 1918.

The eighth assignment alleges that the court erred in permitting the witnesses, Joe Rasnick, Harman Kiser and George W. Kiser, to testify as to the value of the land before and after the timber was taken off, for the purpose of fixing the value of the timber taken. In this contention we cannot concur.

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It appears from the evidence that the defendant not only cut and removed the merchantable timber from the land, but broke down the fences, damaged the undergrowth, tore up the soil, and practically cleared the land of brush and everything growing thereon. No market value was shown for the property taken *and the property injured,* and the most accurate way to measure the damages sustained by the plaintiff was to ascertain the value of the land immediately before the defendant began to cut the timber and immediately after it completed the cutting of the same.

In *C. & O. Ry. Co.* v. *Baylor,* 118 Va. 43, 11 Va. App. 88, in which damages were claimed only for injury to standing timber, the court approved the following instruction: "The court instructs the jury that if they find for the plaintiff, then they shall assess his damages at an amount equal to the difference between the market value of the timber immediately before the fire and its market value immediately after the fire." And in *Jeffress* v. *Va. Ry. & Power Co.,* 127 Va. 732, 20 Va. App. 613, this court stated the law thus: "If the plaintiff is entitled to recover at all, his compensation should be the money value of the property destroyed and the money loss for the property injured, fixed as of the time of the fire."

When a thing, whether it be a building, a tree, or shrub, is destroyed by a wrongdoer, the most natural and best measure of the damage is the value of the thing destroyed as an appurtenant to, or part of, the realty; and ordinarily the value of the thing destroyed would be the measure of the injury to the freeholder. *Disbrow* v. *Westchester Hardwood Co.,* 164 N. Y. 58.

It is likewise true that the amount of the depreciation in the value of the realty, on account of the destruction of and injury to the property appurtenant thereto, would where the property destroyed or injured has no affectionate value, represent the value of the property destroyed.

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The ninth assignment asserts that the court erred in admitting the testimony of William Rasnake, a cousin of James Rasnick, about a conversation he had with James Rasnick, a witness present and testifying, as to the court right.

The statement complained of is, substantially, that James Rasnick, while living on the land which he had surveyed, said to William, "I own and claim this land as my own because the court made me a title to it. Here is my title and it extends as follows," and then read to him a paper which calls for the objects which William knows are the boundaries of the survey. It is immateral that James read it instead of William.

In the case of real estate, declarations by one in possession of land are competent to show that his user or possession was adverse to the title of another, to determine the extent of his possession, to indicate the source of the title relied on, so far as that fact may have legitimate incidental bearing on the good faith and nature of the claims, or its extent; to show the intent with which the declarant made an entry on land—it is not ground for rejecting the declaration, that it is self-serving. 22 C. J. p. 274. The following cases are also instructive; *Clarry* v. *Hatton,* 152 N. C. 107, 67 S. E. 258; *Hill* v. *Bean,* 150 N. C. 436, 64 S. E. 212; *Steadman* v. *Steadman,* 143 N C. 345; 55 S. E. 784.

Declarations of a person in possession of land are primary evidence of the extent of his claim. 22 C. J. p. 275.

Whenever the fact of possession is relevant to the issues, the declarations accompanying and characterizing the same are competent as part of the *res gestae* of the acts of possession. 11 Ency. Ev. 388.

It is intimated by the defendant's attorney that the claim of James Rasnick under the court right was unheard of before this case arose.

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In *Repass* v. *Richmond*, 99 Va. 508, the court stated the law thus: "Where a design to misrepresent is charged upon the witness in consequence of his relation to the party or the case, it may be shown that he made a similar statement before the relation existed."

Where a witness has been assailed on the ground that his story is a recent fabrication, or that he has some motive for testifying falsely, proof that he gave a similar account of the transaction when the motive did not exist, before the effect of such an account could be foreseen or motives of interest would have induced a different statement, is admissible. 40 Cyc. 2798.

This assignment is clearly without merit.

The tenth assignment relates to the court's action in not allowing the defendant's witness, J. B. Kennedy, to testify as to a conversation he had with James Rasnick some years ago about this title, in which Rasnick gave no intimation of his claim under a court right, or other source than the Warder title. The record failing to disclose what answer the witness was expected to make, we decline to consider this exception. *Douglass Land Co.* v. *Thayer*, 107 Va. 292, 1 Va. App. 463.

The eleventh assignment alleges that the court erred in refusing to set aside the verdict of the jury on the ground that it is contrary to the law and the evidence and because the verdict is excessive.

It is admitted that all the records in the clerk's office of Buchanan county were destroyed by fire in 1881 or 1882. But it plainly appears from the evidence that James Rasnick, in 1871 or 1872, secured from the court in that county a court right for the 215 acre tract of land, as provided by section 457 of the Code. The plaintiff was not required to show upon what evidence the court right was granted, or the contents of the court order granting the same, the presumption being that the court would not have granted

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it except upon proper proof, and that the order entered was in the form required by law. This court right gave Rasnick a color of title for all the land included in his survey.

In Virginia, when a person having a colorable title enters upon a vacant possession, claiming title to the whole tract, his possession is co-extensive with his boundaries. *Creekmur* v. *Creekmur*, 75 Va. 439.

While there is some conflict in the evidence, the weight and credibility of the testimony were questions for the jury, and, their findings being conclusive as to the facts, we deem it unnecessary to discuss the evidence in detail. It sufficiently appears that James Rasnick, under his court right, held actual continuous, exclusive, open and notorious possession of the 215 acre tract, including the land in controversy, under a *bona fide* claim of title against the title of all other persons, for more than ten years, the period of the statutory bar, and that he held a good title to said land by adverse possession.

The act of the General Assembly of Virginia, approved March 3, 1880, creating and establishing the county of Dickenson, provides in terms that James Rasnick's farm shall be included in the new county. The report of the surveyors who established the county lines shows that they included his farm in Dickenson county, although it is contended that the line of the actual survey made by them left this farm in Russell county. The plaintiff should not suffer for the oversight or error of the surveyors. The act of the Legislature and the report of the surveyors having placed James Rasnick's farm in Dickenson county, and the surveyors having neither the authority nor the power to make it a part of Russell county, their act in so running the line as to place it in Russell county is a nullity. The deed from Warder to Virginia, Tennessee & Carolina Coal & Iron Company, dated December 8, 1887, having never been recorded in Dickenson county and James Rasnick having no notice

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or knowledge of it until 1908, he was, under his deed from Warder, dated March 10, 1888, a purchaser for value and without notice, and held the legal title to the land in controversy as against the Virginia, Tennessee & Carolina Coal & Iron Company and those, claiming under it.

The evidence as to the value of the timber cut and the damage done to the land in other respects, was conflicting, but there was ample evidence to support the verdict of the jury and we cannot say the damages assessed by them are excessive.

The instructions, as a whole, fully propounded the law on every material question in the case and we find no error in them of which the defendant can complain. Besides, since, under the evidence, the jury could not have rendered a verdict for the defendant company, it cannot be said that it was prejudiced by the granting or refusing of instructions.

We find no error in the judgment complained of and it must be affirmed.

Affirmed.

LINKOUS, ET AL., *v.* HARRIS, ET AL.

(*Staunton, September 21, 1922.*)

1. REAL ESTATE AGENTS.—Commissions—Performance of Contract—Evidence—Subsequent Sales by Owners—Instructions—Refusal by Owners to Consummate Sale—Direction of Verdicts—Code, sec. 6003.

Error to Circuit Court of Giles county.

Affirmed.

R. L. Jordan and *Jackson & Hanson*, for the plaintiffs in error.

Williams & Farrier, for the defendants in error.

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This is an action at law instituted by the defendants in error as plaintiffs in the court below against the plaintiffs in error as defendants in such court. The parties will be hereinafter referred to in accordance with their positions in the trial court or by name.

The object of the action is to recover $2,543.33, being 10% commissions on $25,433.30, the aggregate price at which certain land belonging to the defendants was sold at a public auction sale by the plaintiffs, under a contract in writing, the material provisions of which are as follows:

"This Contract of Agreement made and entered into this tenth day of November, 1919, by and between Linkous and Shumate, party of the first part, and Frank Miller Land Corporation, * * party of the second part:

"Witnesseth:

* * * * * * * * * *

"First: That the said party of the first part has this day engaged the said party of the second part to sell for him at public auction, upon a date to be agreed upon, within sixty days from this date, all that certain tract or parcel of land," (describing it), "containing four hundred and fifty acres, etc.

* * * * * * * * * *

"Fourth: It is agreed and understood that if the said land does not sell for a price that is satisfactory to the party of the first part, that they are to pay to the party of the second part all actual and legitimate expenses incurred in putting on the sale, which amount shall not exceed three hundred and fifty dollars, this amount to include surveys and to be in full for services rendered, but if the sale of the land is confirmed at the price it brought then the party of the first part is to pay to the party of the second part 10 per cent of the amount the farm is sold for. * * * "

(Then follow provisions designating what shall be the cash payment and other terms of sale).

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* * * * * * * * * *

"Witness the following signatures, in duplicate, on this day and year first above written.

(Signed) "Linkous and Shumate
"By W. W. Shumate
"Frank Miller Land Corporation
"By T. G. McChesney."

There was a trial by jury resulting in a verdict in favor of the plaintiffs as follows: "We the jury find in favor of the plaintiffs and allow the 10 per cent commission on the amount of the sale $2,543.33."

Thereupon the defendants moved the court to set aside the verdict, on the grounds that, (a), the court erred in the admission of certain testimony introduced by the plaintiffs, over the objection of the defendants and in refusing to strike out such testimony on motion of the defedants; (b), in refusing certain instructions offered by the defendants; (c), in amending and giving as amended a certain instruction offered by the defendants; and (d), in refusing to set aside the verdict as contrary to the law and the evidence, and as without evidence to support it. This motion the court overruled and the court entered judgment in accordance with the verdict, and the defendants assign errors.

The facts shown in evidence, as they must be taken to be in view of the verdict of the jury, and certain conflicting testimony, are, so far as material, as follows:

Linkous and Shumate, mentioned as the "party" of the first part in the written contract aforesaid, was a mercantile partnership, composed of the defendants, R. T. Linkous and W. W. Shumate, as partners. The title to the aforesaid land was in Linkous, but Shumate was entitled to a share in whatever profits might arise from a sale of it, and the authority of Shumate to execute said contract as he did is not questioned by Linkous.

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All of the communications and dealings of the defendants with the plaintiffs, from their inception until after the sale had been made, were, on the part of the defendants, transacted by Shumate entirely. The preliminary talk leading up to the contract, the examination of the land by plaintiffs preceding the execution of the contract, were had with Shumate acting for his partnership and he thus executed the contract as appears therefrom.

Further: The sale was held on December 9, 1919, (the day agreed upon as provided for in the contract), by the plaintiffs, Shumate being present on the ground acting in behalf of his firm. Linkous was not present at the sale.

At the sale the land was offered for sale in parcels by the plaintiffs' auctioneer. Prior to the sale, upon the request of the plaintiffs to know what aggregate price would be satisfactory to defendants, and what total sale price would be confirmed, Shumate stated to plaintiffs that $25,000.00 would be satisfactory as the total price, and that the sale would be confirmed if they aggregated that amount. Thereupon the sale proceeded and the bids aggregated $25,433.30 as aforesaid. As the land was bid off one of the agents of plaintiffs, acting as clerk, had the purchasers and the auctioneer both sign memoranda in writing setting forth the description of the respective parcels bought, the price and terms of sale,—the latter being, in each instance, in accordance with the provisions of the aforesaid contract on the subject of the terms of the sale. Just before the last parcel of the land was offered for sale, and it had become evident that the whole of the land would sell for an aggregate of $25,000.00, which Shumate had stated as aforesaid, in advance of the sale, would be a satisfactory price, and would be a price at which the sale would be confirmed, the following occurred, according to the testimony of the plaintiff Miller, who was present supervising the conduct of the sale: "Mr. Shumate asked

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us to wait a little while, and he walked over this tract of land," (the last parcel to be offered), "with a man from West Virginia, as well as I remember his name was Leedy, but I am not positive about that. He came there to buy some land and he waited some little bit and finally Mr. Shumate got up on the hill where we could see him and we called him back down there, and when he come back, just before he came up to the wagon," (the auction wagon), "I met him and told him the crowd was getting restless and we wanted to go ahead with the sale, and he said, 'Well,' he said, 'before we go any further with this sale I will go into a written contract with you, to pay you $2,500.00 commission, but,' he said, 'I am not going to let these three tracts that we sold down there this morning,' the three first tracts we sold, 'nor this tract go;' 'because,' he said, 'if this man I had up there with me can get his partner over from West Virginia, I believe he will give me $25,000.00 for those four tracts, and I am not going to let them go or this one;' and I said, 'it is not necessary to go into a written contract, the written contract we have got is all that is necessary, provided you have the auctioneer confirm the sale, etc;' so he said he would do that, and that I told him in order to make the farm bring $25,000.00 it wasn't necessary for him to bid but $70.00 an acre on the remaining tract, which he said he wanted to do, and he did bid that on that tract, as well as I remember, and bought it at $80.00 per acre, and after that he told me he was ready to confirm the sale and have the auctioneer announce that the sale was confirmed, and that they would meet at the Narrows that evening, and then he changed that, and said to meet at the Narrows the next morning to make the deeds."

"Q. Then Mr. Shumate, after the sale was made of all the different tracts, directed the auctioneer in your presence to announce that the sales were confirmed and for the parties to come forward and comply with the terms of sale?

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"A. Yes, sir.

"Q. And the auctioneer did this?

"A. Yes, sir.

"Q. In the presence of Mr. Shumate?

"A. Yes, sir, that is the way we always have our auctioneers do at the close of the sale."

The testimony for the plaintiffs was to the effect that at this auction sale Shumate was in truth the bidder for all of the land except four parcels, aggregating something over $10,000.00, which was bid in by one M. D. Robertson, who is a father-in-law of Shumate; but that Shumate had one Lambert sign the said memoranda for three of the parcels and one Dungan sign the memoranda for the other parcel in truth bid in by Shumate, Robertson signing for the parcels bid in by him.

These memoranda had all been signed by the auctioneer and said parties as purchasers, and Shumate knew how the memoranda had been signed, before he confirmed the sale as aforesaid.

Thereupon every one left the place of sale and the plaintiff Miller, the defendant Shumate, and others, went to the store of Linkous and Shumate. On their way to the store Miller met Linkous, coming out to the sale, and Linkous returned to the store. Either before or after getting to the store, Miller, according to this testimony, told Linkous the result of the sale, the total amount of the sale aforesaid, and who all of the bidders were. On this subject Miller testified as follows: "I told him (Linkous) that Mr. Robertson, Mr. Shumate's father-in-law, had bought four tracts of land and I told him that Mr. Shumate had bid in one tract of land for himself, and I told him that a man by the name of Lambert had signed for two tracts which I had every reason to believe that Mr. Shumate had him buy for him. I said Mr. Lambert refused to sign for those tracts when the clerk went to him, and then, after the

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last tract was sold, Mr. Shumate had Mr. Lambert sign for that tract and then he" (Lambert) "said, 'I will sign for the other two tracts.' Then I also told him that the home tract was bought by Mr. Shumate, although it was signed for by a man named Dungan. My reason for that was because I had gone to Mr. Dungan and asked him to give me a bid on the land and he told me he was not interested in it and when his bid was turned in Mr. Shumate was standing by him talking to him." Miller was then asked and, so far as material, answered as follows:

"Q. What did Mr. Linkous state in regard to that?

"A. It doesn't make any difference who bought it, if Mr. Shumate bought it he will have to take it like anybody else and pay for it."

The testimony for the plaintiffs was to the effect that the plaintiff, Miller, then told Linkous that the plaintiffs would not be at Narrows the next day, that they had to go to another sale, but wanted to know something about their commissions; and that Linkous thereupon said: "Well, you can rest assured, you will get your commission." Linkous, in his testimony on this subject said: "After we went back to the store, I had not met any of these gentlemen that were selling the land, but was introduced to them there * * * and they asked me if I was satisfied with the sale, * * * and I told them I was, I thought it brought a very fair price." Linkous thereupon further testified that when he made this statement he had been informed of the total amount of the sale and who some of the purchasers were, but none of the papers had been turned over to him and that he "did not know who they all were;" and that on his being shortly afterwards called into the back room where the plaintiffs wanted "to settle up," he "told them that they would get every dollar of their commissions if the people came across,"—meaning if the purchasers came forward the next day at Narrows and closed their pur-

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chases in accordance with the aforesaid memoranda signed by them.

The next day Shumate did not appear, and none of the purchasers appeared to close the sales, except Robertson, who appeared and stated to Linkous that he was not able to pay for all four of the parcels of land bid in by him and that he did not want but two of them, and refused to take the four parcels. Linkous states in his testimony that he did not insist on Robertson's complying with his contract of purchase evidenced by the memorandum Robertson had signed, because Robertson told him "he was misled and did not know he was getting the two upper tracts and he couldn't pay for them and he wouldn't take them," and because he "knew Mr. Robertson long enough to know that he was positive," and that the transaction "just stopped there;" that he (Linkous) then "dropped it;" and that he did not insist on Dungan's complying with his contract. He says nothing specifically about what he did about requiring Lambert to comply with the memoranda signed by Lambert for three of the parcels of the land, (which memoranda were introduced in evidence), nor about requiring Shumate to comply therewith. Lambert testified, however, to the effect, in substance, that he acted merely at the request of Shumate and that Shumate was the real purchaser of the land for which Lambert signed the memoranda aforesaid. Neither Shumate, nor Dungan, testified in the case, and there was no testimony controverting the above mentioned testimony of the plaintiff Miller, to the effect that all of the sales, except that to Robertson, were in truth to the defendant, Shumate, and that Linkous knew this, and knew that Robertson was the purchaser of the residue of the land before Linkous expressed his satisfaction with the sales and consented to pay the commissions.

Linkous and M. D. Robertson testified to the effect that on December 13th, four days after the auction sale, the

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defendants executed a deed conveying to M. L. Robertson, a son of the above mentioned M. D. Robertson, three of the parcels of land, which the latter bid in at the auction sale, at the price of $8,000.00.

On his cross-examination Linkous testified that "a very short time after that" the defendants sold to one T. E. Turner two other parcels of the land for $9,000.00 and to "a man by the name of Stowers" the residue of the land for $10,000.00, making the total price thus obtained for the land $27,000.00, an excess of $1,566.70 over the auction sale price.

The testimony mentioned in the two next preceding paragraphs is the testimony which is referred to in the motion to set aside the verdict of the jury on the ground of the erroneous admission and refusal to exclude testimony, which is above mentioned.

The plaintiffs asked for no instructions.

The defendants asked for the following instructions:

"Instruction No. 1.

"The court instructs the jury that in order for the plaintiff to recover the commissions sued for, it is necessary for them to prove the purchasers of the land complied with the terms of sale, by paying the ¼th cash, and executing the deferred purchase money notes, as set forth in the contract between the plaintiff and the defendants, or offered to pay said cash payment, and execute said deferred purchase money notes.

"Instruction No. 2.

"The court instructs the jury that if they believe from the evidence that the purchaser, M. D. Robertson, failed to pay the cash payment and execute the deferred purchase money notes, and such failure was not caused by any act of the defendants, then upon such refusal and failure on the part of said Robertson, the defendants had the right to reject the other sales made.

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"Instruction No. 3.

"The court instructs the jury that they cannot allow the commissions sued for, but only the expenses mentioned in the contract between the plaintiff and defendant."

The court refused to give Nos. 2 and 3 of such instructions; but modified instruction 1 by adding at the end of it the following: "unless the failure of the purchasers at the sale to pay the cash payment and execute the deferred purchase money notes was occasioned by some acts of the defendants,"—and gave such instruction as so modified. This was the only instruction given.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court.

The question presented by the assignments of error will be disposed of in their order as stated below.

1. Did the court err in admitting, or in refusing to exclude the testimony above mentioned on the subject of the sales of the land made by the defendants subsequently to the auction sales made by the plaintiffs?

The question must be answered in the negative.

It is true that these sales were not made by the plaintiffs or to the same purchasers as those whom the plaintiffs had obtained at the auction sale, and, hence, the evidence in question was not admissible on that ground. But in view of the testimony for the plaintiffs, strongly tending to show that after the plaintiffs had fully performed on their part their contract with the defendants by the auction sale and the defendants had both expressed themselves satisfied with such performance, after knowing who the purchasers were and what character of contracts plaintiffs had obtained from them at the auction sale, the defendants, did not, in good faith, make any effort to close those sales, but decided not to do so and abandoned them all, for the sole reason that the defendants found that they

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could sell the land at a substantially larger price by making the private sales which they did make shortly after the auction sale, it is manifest that the testimony in question was properly admitted.

It is argued for the defendants that there was no evidence before the jury to show that Linkous knew who all of the purchasers at the auction sale were before he announced his satisfaction with such sale; and that he had the right to subseqently qualify his expression of satisfaction and confirmation of such sale in agreeing to pay the plaintiffs their commissions, by the statement, which he claims to have later made, to the effect, that such commissions would be paid "if the people" (meaning such purchasers) "came across." But, as set out in the statement preceding this opinion, we find ample evidence in the record, which was before the jury, warranting them in concluding that Linkous had been fully informed who all the purchasers at the auction sale were before he announced his satisfaction with the sale and confirmed the sale by consenting to pay the commissions, and that his testimony on the trial to the contrary was to be taken *cum grano salis*. This being so, even if Linkous after confirming the sale as aforesaid, subsequently attempted to qualify his confirmation of the sale by adding, in the talk in the back room, that the commissions would be paid, "if the people came across," that was too late to disturb the right of the plaintiffs to their commissions, since that right became fixed the moment the defendants in fact became satisfied with the price obtained at the sales by plaintiffs and confirmed such sales. They could not, nor could either of them, after having become satisfied and having confirmed the sales, at any time thereafter, as an after-thought, place a condition upon such satisfaction and confirmation for which the contract makes no provision. Under the contract, an unqualified expression of satisfaction with and confirmation of the sales, could not be subsequently qualified.

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2. Did the court err in modifying instruction No. 1 asked for by the defendants by the addition,—"unless the failure of the purchasers at the sale to pay the cash payment and execute the deferred purchase money notes was occasioned by some act of the defendants?"

The question must be answered in the negative.

It is urged in argument for the defendants that there was no evidence before the jury sufficient to show that any act of the defendants occasioned the failure of the purchasers at the auction sale to close their purchases in the particulars mentioned in the *addendum* to the instruction under consideration. That position overlooks the testimony of the plaintiff Miller, to the effect that Shumate, at the close of the auction sale, declared the purpose not to consummate any of the auction sales if it was found that a better price for the land could be obtained by subsequent sales to other purchasers; also overlooks the fact that the defendant, Shumate, failed to testify in the case; that he failed to comply with his purchases at the auction sale; and likewise overlooks the testimony with respect to the conduct of the defendant, Linkous, which shows, by his own admissions, indeed, that he made no effort whatever to close the auction sale purchases; and, too, overlooks the very pertinent fact that the defendants obtained an increase of price, amounting to $1,566.70, by abandoning the auction sales and making the subsequent private sales which they did make of the land.

3. Did the court err in refusing to give instruction No. 2?

The question must be answered in the negative.

The subject of the instruction here in question was covered by the *addendum* aforesaid to instruction No. 1 as given.

4. Did the court err in refusing to give instruction No. 3?

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The question must be answered in the negative.

From what has been said it is manifest that this instruction, if given, would have taken from the jury the question of fact submitted to them by the aforesaid *addendum* to the instruction which was given.

An interesting argument, accompanied by citations of authorities, is contained in the brief of the learned counsel for defendants, on the subject of the unconstitutionality of the section of the Virginia Code, (sec. 6003), forbidding the direction of verdicts, and urging that we should review and reverse our previous holdings on that subject and decide that the instruction No. 3, under consideration in the instant case, should have been given, notwithstanding the fact that it is a peremptory instruction. Inasmuch, however, as we have, for a different reason from that of the unconstitutionality of the statute mentioned, reached the conclusion above expressed with respect to the erroneous character of the instruction, it becomes unnecessary for us to deal with the constitutional question presented.

The case will be affirmed.

Affirmed.

SCHOOL BOARD OF SAND LICK DISTRICT *v.* SMITH, ET ALS.

(*Staunton, September 21, 1922.*)

1. SCHOOLS.—Title to Property—Authority of School Board to Convey—Code 1904, secs. 824, 1466-a, 1488—Fraud—Failure of Purchaser to Disclose Peculiar Value of Property Purchased.

Appeal from Circuit Court of Dickenson county.

Affirmed.

Chase & McCoy, for the appellants.

Irvine & Stuart, A. A. Skeen and *S. H. & Geo. C. Sutherland*, for the appellees.

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WEST, J.:

The School Board of Sand Lick magisterial district, Dickenson county, owned an old school-house lot containing something more than one-half of an acre of land, situated near the mouth of Mill creek, where it empties into McClure creek, and where the mining town of Moss is now located. This lot is made up of a narrow strip of level land, lying along Mill creek, and a steep hillside, and was originally conveyed to the School Board of Ervington district as containing an half acre. Later, the district lines were so changed as to transfer this lot into Sand Lick district. A one-room log school-house was built upon it and used for school purposes for some years. Willis district, which also adjoins Sand Lick district, erected two modern school-houses at points not very far from the school-house in controversy, and these new schools drew away from the Mill creek school a portion of its patronage. The old log house having become more or less dilapidated and being out of date, the question of the erection of a larger and better building was being considered by the Sand Lick district school board, and it was suggested, as the old lot was too small and near the district line, and the building inadequate, that it would be wise to secure a larger lot farther up Mill creek, upon which to erect the new building.

Some time in January, 1917, W. H. Smith secured from S. J. Viers an option to purchase a tract of land containing forty-five acres, located about one and one-half miles up Mill creek from the old location. Soon thereafter he learned that the trustees of Sand Lick district had about decided to move the school-house site farther up Mill creek, and he approached T. K. Colley, one of the trustees, who confirmed what Smith had heard about the desired change of location, to bring the school more nearly in the center of the school population. Negotiations were entered into and Colley called a meeting of the school board, at which the

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exchange of the old Mill creek school lot to W. H. Smith for two acres of the S. J. Viers tract was agreed upon. Forthwith, the school board of Sand Lick district filed before the judge of the circuit court a petition, under section 1466-a of Pollard's Code as amended, and secured authority to make the exchange of these lots. Pursuant to the authority thus granted, the trustees, by deed dated February 14, 1917, conveyed the old school lot to W. H. Smith, and Smith and wife, by deed of even date, conveyed two acres of the S. J. Viers tract to the school board.

On February 18, 1918, W. H. Smith sold and conveyed an undivided one-sixth interest in the said one-half acre lot to Eivens Tiller. On March 12, 1918, W. H. Smith conveyed a five-sixth interest in this lot, along with other property, to S. H. Sutherland, trustee, to secure Gallie Friend and W. B. Trivett, as endorsers on two notes of five thousand dollars each, due the Dickenson County Bank, Inc.

The trustees for said district were, when said exchange was made, T. K. Colley, Fletcher Powers and A. J. Viers, and when this suit was filed, Noah C. Deel, Fletcher Powers and Joseph H. Rasnick.

This suit was instituted in January, 1919, by the school board of Sand Lick magisterial district against W. H. Smith, S. J. Colley, Jr., Eivens Tiller, S. H. Sutherland, trustee; Gallie Friend and W. B. Trivett, for the purpose of setting aside and vacating the said deed from the school trustees of said district to W. H. Smith, dated February 14, 1917, conveying said school-house lot near the mouth of Mill creek, on the grounds: (1) That said Smith neglected and failed to comply with some of the material requirements and provisions of the statute in obtaining said deed, and (2) because of fraud and improper influence, used by him and his confederates in obtaining this exchange deed. The bill also prays for the cancellation of the deeds aforesaid to Tiller and Sutherland, trustee.

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The defendants filed their several answers to the bill, denying the charges of fraud, Smith answering each allegation of the bill and the other defendants answering such parts as affected them severally.

The case was heard in the Circuit Court of Dickenson county upon the pleadings, exhibits filed and the depositions of more than sixty-five witnesses, and a decree was entered dismissing the bill at the costs of the complainant. The case is before us on an appeal from that decree.

W. H. Smith conveyed to the school board the two-acre lot in consideration of the conveyance to him of the half-acre lot. There is no ground on which he can ask for a cancellation of his deed to the board, and he is satisfied with its deed to him, but the board asks for the cancellation of its deed to him on the ground that he failed to comply with some of the provisions and requirements of the statute in obtaining it. It will be observed that the statutes contain no provision imposing any duty on one who secures title to real estate from a school board, but prescribe what steps shall be taken by the board in order to acquire or pass title to real estate.

It was clearly the duty of the board to see to it that all the provisions of the statute necessary to make its deed valid were complied with, and upon its obligation to do this Smith deeded his two acres of land to the board.

It is settled law that a party who assumes to convey an estate by deed is estopped, as against the grantee, to assert anything in derogation of the deed. He will not be heard, for the purpose of defeating the title of his grantee, to say that at the time of the conveyance no title passed by the deed, nor can he deny to the deed its full operation and effect as a conveyance. 20 C. J., p. 1067, and cases cited.

The statute law relating to titles to school property is contained in sections 824, 1466-a and 1488 of Pollard's Code.

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The sections aforesaid, so far as material to the consideration of this case, on February 14, 1917, read as follows:

Section 824. "Title to real estate for public uses to be approved by attorney at law; appeal.—Whenever it shall be necessary for any county, district school trustee, or other public officers of the county, having authority for the purpose, to purchase real estate or acquire title thereto for public uses, the contract therefor shall be in writing, and the title thereto shall be examined and approved in writing by a competent and discreet attorney at law, who shall be designated by the judge of the circuit court for the circuit wherein the real estate is located, and such approval shall be recorded along with the deed or other papers by which the title is conveyed. No such contract shall be valid unless and until the title to such real estate be thus approved; and if the attorney who has been designated by the court refuses to approve the same, the disapproval shall be in writing and filed with the clerk of the county. The supervisors of the county, or any five citizens thereof, may, by motion, appeal of right from the decision of the attorney to the circuit court of the county, or to the judge thereof in vacation, submitting with said motion their petition, accompanied with the evidences of title. Ten days' notice of such motion shall be given to the said attorney, and from the decision of the said court, or the judge thereof in vacation, upon said motion, an appeal of right may be taken by the petitioners to the Supreme Court of Appeals."

Section 1466-a. Authorizing school boards to sell or exchange public school property. "Any county, district or city school board may file its petition in the circuit court of its city or county or the corporation or the hustings court of its city, or before the judge thereof in vacation, asking leave to sell or exchange any public school property which, in its judgment, it is desirable to sell or exchange, and upon evidence being produced before the court, or judge

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thereof in vacation, that such sale or exchange is proper to be made, the said court, or judge thereof in vacation, shall make such order as may be proper providing for the sale of said property, or that the same may be exchanged * * *."

Section 1488. Condemnation and purchase of land for school-houses. "* * * whenever it shall be necessary for any county or district school board, or other public officers of the county having authority for the purpose, to purchase real estate or acquire title thereto for public uses, the contract therefor shall be in writing, and the evidence of title be submitted to the circuit court, or to the judge thereof in vacation, for approval, which approval shall be entered of record by the clerk of the court. No such contract shall be valid unless and until the title to such real estate be thus approved; and if the court or judge refuse to approve the same, the disapproval shall be recorded in like manner."

It is apparent that section 1466-a is the only section that applies to the sale or exchange of school property—the passing of title to property owned by a school board, and it is admitted that the provisions of this statute as well as section 1488 were fully complied with. But it is contended that it was necessary also to comply with the provisions of section 824. In this contention we cannot concur. Section 1466-a provides that "upon evidence being produced before the court or judge thereof in vacation, that such sale or exchange is proper to be made, the said court, or the judge thereof in vacation, shall make such *order as may be proper* providing for the sale of said property, or that the same may be exchanged." This is an *ex parte* proceeding before the court or judge thereof. The language quoted vests the court with plenary powers, and it is not to be presumed that the judge will deem any order authorizing the exchange of the property "*proper*" until he has become

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satisfied that the title to the property which the school board will get in exchange is clear. This statute leaves the entire matter to the judge, and, in case of an exchange of property, no separate proceeding under section 824 or section 1488 is necessary in order to give validity to the deeds which are executed to consummate the exchange.

Besides, sections 824 and 1488 have no reference to property which the board is endeavoring to *pass the title to*, but simply to property the title to which it desires to secure. And in the latter case, while they have the same object to accomplish, they prescribe two inconsistent methods of attaining it.

Under section 824, the title to the real estate to be purchased or acquired shall be *examined and approved in writing by an attorney at law* designated by the judge of the circuit court, and such *approval* shall be *recorded along with the deed* for the property. While section 1488 requires that the *evidence of title* be submitted to the *judge of the circuit court* for approval, which approval shall be entered of record by the clerk of the court.

There is no provision in either statute requiring the title to be passed upon by both the court and an attorney. The decision of either is final, if no appeal be taken. If the attorney refuses to approve the title, the deed would be void under section 824, even though the court approved it under 1488. If the attorney approved it and the court disapproved it, under the language of the statutes, we cannot say which one should prevail. In such an event, the two statutes are irreconcilably in conflict.

By the act approved December 10, 1903, section 824 was so amended as to require the *evidence of title* to be *submitted* to the *circuit court or judge thereof for approval* And by the act approved December 28, 1903, section 1488 was also amended so as to include exactly the same provision. In Pollard's Code 1904, volume 1, both statutes con-

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tain these same provisions, which remained in force until section 824 was so amended by the act approved February 20, 1912, as to require the title to be *examined and approved in writing by a competent and discreet attorney at law,* and *such approval to be recorded along with the deed.* By the act approved March 21, 1914, section 1488 was amended and re-enacted with the same clause contained in the act of December 28, 1903, requiring the title to be *approved by the circuit court or the judge thereof.* This being the latest enactment, it repeals by necessary implication so much of section 824 as required the title to be examined by an attorney.

In the absence of fraud, it follows we cannot set aside the deed from the school board conveying to Smith the half-acre lot.

Was W. H. Smith guilty of such fraud and improper influence in obtaining this exchange deed as to warrant the court in granting the relief prayed for in the bill?

This suit was instituted two years after the exchange of the lots was accomplished, and not until two trustees who were in favor of this proceeding had been appointed to succeed T. K. Colley and A. J. Viers.

The bill contains numerous allegations of fraud and improper conduct on the part of W. H. Smith and his friends, and the testimony is voluminous and conflicting and much of it is immaterial. We shall not attempt to discuss every question raised in the record, but only such as may appear necessary in order to properly dispose of the allegations of fraud.

It is alleged in the bill that the judge of the circuit court was imposed upon by the fraudulent acts and representations of appellees—Smith and Colley, trustee—and induced to enter the order approving the exchange of the one-half acre lot, which he would not have done had he known the facts. Yet, after argument and a full consideration of all

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the facts shown in evidence, the distinguished judge of the circuit court decided he had not been imposed upon, that no fraud had been proven, and dismissed the bill.

The board alleges in its petition that there are twenty issues raised in the case. These we will now consider:

First issue: "As to the plans of the Clinchfield Coal Corporation for the development at Moss at the time Smith left the employment of the company, January 31, 1913, and what of these plans were known to him."

It is extremely doubtful that Smith, while in the employ of the Clinchfield Coal Corporation, secured any secret information as to the plans of the corporation to locate a mining town at Moss, which was built four years after he left the company. If he did, he occupied no confidential relation with the school board and was under no obligations to disclose to it information which he had obtained from any source.

"Silence on the part of the purchaser or failure to disclose knowledge on his part of the peculiar value of the property sold would not be sufficient to set aside a sale fairly made without misrepresentations or fraud." *Merchants Bank* v. *Campbell*, 75 Va. 460.

If it is true, as contended by the appellant, that at the time of the exchange the development at Moss was so apparent that every one knew, or ought to have known, it, then Smith's secret information, if he possessed any, was of no value to him and could not have prejudiced the school board.

Second issue: "As to what had been done and was being done at Moss at the time the defendant, Smith, obtained his deed for the school-house lot, in the way of installing the plant of the Clinchfield Coal Corporation."

The evidence on this question is very conflicting. But it plainly appears that some camps and temporary buildings were in process of construction and that the engineers

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were making surveys. Some of the witnesses testified that work of this kind had been going on in Dickenson, at different places, for many years and that it did not always mean what it seemed to indicate. It appears from a statement filed in evidence by the auditor of the Clinchfield Coal Corporation that the company's pay roll for January, 1917, at Moss was $172.75, and for February, 1917, $180.41, which shows beyond doubt that the company was doing very little work at that point in February, 1917.

Third issue: "As to whether or not S. J. Colley, Jr., and Eivens Tiller were interested with Smith in acquiring the school-house lot."

The charge is that T. K. Colley, one of the trustees, colluded with these three defendants in procuring this lot, and that S. J. Colley, Jr., his son, and Tiller were interested with Smith in acquiring it. This charge is not sustained by the proof. Smith denies that young Colley was in any way interested in the purchase of the property, and S. J. Colley, Jr., who is a man of good reputation and cashier of a bank, testified that he had no knowledge of the negotiations for the purchase of the lot until after the deeds were executed; that he did, some time thereafter, discuss with Smith the question of purchasing a one-sixth interest in the lot, but, on account of his lack of money, the proposition was never consummated. T. K. Colley, trustee, father of S. J. Colley, Jr., denied the charge of collusion, and testified that he never heard of his son being connected in any way with the transaction. This testimony is not successfully contradicted.

On the day before the exchange was made, Smith borrowed a thousand dollars of Tiller to make a payment on the Viers land and told him of the proposed exchange and stated to Tiller that if the deal was consummated he would sell Tiller a one-sixth interest in the school lot and credit it on another note Smith owed him. Tiller refused to ac-

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cept the proposition, claiming the price asked by Smith, $150, was too high. The matter was dropped, but about a year later Tiller did purchase a one-sixth interest in the lot at $150, and credited the amount on a note for $250, which Smith owed him. This fact is entirely immaterial, however, to the issue involved here, as Tiller never mentioned the exchange of these lots to either of the trustees, or in any way attempted to influence them in the matter.

Fourth issue: "As to why Smith and his associates attempted to exchange another lot for the school-house lot instead of purchasing the lot at a sale"; and,

Fifth issue: "As to Smith and his associates purchasing the Viers farm at an exorbitant price so as to have a lot to exchange for this school lot."

Knowing the school board was considering the advisability of securing a new location farther up Mill creek, and being the owner of the Viers tract only a mile and a half away, it was but natural that Smith should offer to *exchange* a larger lot for the school-house lot, rather than buy it, and to do so was not a badge of fraud. It is to be presumed that the board would not have *sold* the lot without knowing where a larger one could be secured.

Upon the conflicting evidence as to the value of the Viers farm, we cannot say it was not worth the price paid for it. There is no proof that A. J. Viers, trustee, was in any way influenced by the fact that his brother was selling the land to Smith.

Sixth issue: "As to the defendant, Smith, knowing that the school-house lot at Moss was in a bad location for a school, and the present building being totally inadequate, and as to no improper influences being brought to bear on T. K. Colley and A. J. Viers, two of the trustees, to cause them to make this exchange, and that their actions were for the public good."

There is no evidence in the record which will satisfy an impartial mind that T. K. Colley and A. J. Viers were ac-

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tuated by any improper motive in exchanging the old school lot for the two-acre lot. The old lot was admitted to be too small and the building inadequate. The patrons of the school, led by N. C. Deel, one of the present trustees, had, prior to that time, urged a change of location to a point farther up Mill creek, and there is nothing in the evidence to prove that these trustees did not do what they believed at the time to be for the best interest of the people of the district.

Seventh issue: "As to Smith going to Big Stone Gap to secure the services of lawyers to prepare the petition for this exchange, and as to his having A. A. Skeen make the abstract of title to the lot which he was letting the school board have."

Smith had agreed with the school board to have the petition and deeds prepared and titles examined at his own expense. The employment by him of such distinguished members of the bar as A. A. Skeen and R. T. Irvine, of Big Stone Gap, was certainly not even a badge of fraud.

Thirteenth issue: "As to the value of the school lot."

At the time of the exchange, Eivens Tiller, a prominent and successful business man, who had served two terms as treasurer of Dickenson county, and was doubtless well informed as to property values in the county, refused to purchase a one-sixth interest in this lot for $150. One year later he bought the same interest for that amount. Since the town of Moss has been built up around this lot, it has, doubtless, greatly enhanced in value and, it may be, would now sell for several thousand dollars, in view of the fact that it is the only lot at Moss not controlled by the Clinchfield Coal Corporation and has upon it a store operated by W. H. Smith in competition with the corporation's own mercantile business. We are satisfied, however, that the valuations placed upon it by many of the complainant's witnesses are greatly inflated. The mere fact that the lot

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has greatly enhanced in value since Smith acquired the title to it is no reason for stamping the transaction as fraudulent.

Sixteenth issue: "As to the activity of T. K. Colley in getting the exchange closed up."

Appellant claims that the record shows that T. K. Colley acted dishonestly as an official. In this contention we cannot concur. There is no suggestion that he derived any personal gain out of the exchange of the lots, but it is contended that he was too active "in getting the exchange closed up." The record shows that he had reason to believe many of the people of the district desired the location of the school-house changed to a point farther up Hill creek, and that he was convinced it would redound to the interest of the public to make the change. Being so convinced, it was his duty to call a meeting of the school board to consider the proposition offered by W. H. Smith, and when the proposition was approved by the board it was his duty, or the duty of some member of the board, to present the proper petition to the judge of the circuit court, supported by the necessary proof, and secure an order authorizing the trustees to execute the exchange deed. Notwithstanding the efforts of the appellant to besmirch his character and reputation, many leading citizens of his county testified that T. K. Colley's reputation for honesty and freedom from corrupting influences is still good.

When asked, "Why were you so keen to make the exchange," T. K. Colley answered: "For the benefit of the district."

The suggestion that it was legally necessary to consult the division superintendent of schools before making the exchange of the school lot is without merit. The legislature has prescribed the necessary procedure to exchange school property, and there is no provision requiring that the exchange shall be approved by the division superintendent.

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Seventeenth issue: "As to the carelessness of the trustees in not making an investigation as to the value of the old school-house lot at Moss."

While it may have been negligence on the part of the trustees not to make some investigation of the value of the school lot, they were, doubtless, fairly well informed on the subject, and their failure so to do did not constitute a badge of fraud.

The remainder of the "twenty issues" involve matters which, in our view of the case, have little bearing on the question of fraud, or matters considered elsewhere in this opinion, and a further discussion of them *seriatim* would prove unprofitable.

It is true that Fletcher Powers, the only one of the old trustees now on the board, testified that he thought the exchange transaction was a fraud; but, on February 28, 1918, more than a year after the exchange was made, he wrote W. H. Smith a letter containing the following language:

"Yes, I believe you acted in good faith in that school-house lot transaction * * *.

"The Mill creek school-house lot is your property, and, so far as I am concerned, you may take possession of it just any time you see fit. The school taught there this year was not a success, so I am informed, and then said school-house is not large enough to accommodate the children who might wish to attend the school there."

Evidently this letter was written before the question of instituting this suit had been agitated among the people of his district, and while he entertained the same views he entertained the day he voted for the exchange.

The charge that W. H. Smith conducted his negotiations for the exchange with great secrecy is not borne out by the testimony. He first discussed the matter with T. K. Colley, trustee, on the street in the town of Clintwood, and

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next appeared before the school board at a meeting called for the purpose and presented his proposition for their consideration; and later he appeared before the judge of the circuit court who had to grant the authority for the exchange to be made. It can hardly be said that a business transaction thus handled was handled with great secrecy.

Upon a careful consideration of the whole record, we have reached the following conclusions:

(1) If developments of the Clinchfield Coal Corporation at Moss had been permanently suspended on February 14, 1917, this suit would never have been instituted.

(2) The school board of Sand Lick district made the exchange of the Mill creek lot in good faith, believing they were doing what was for the best interest of the people of Sand Lick district.

(3) The record fails to show that W. H. Smith perpetrated a fraud, or used any improper influence, in obtaining the exchange, for which his deed should be set aside.

(4) If Smith got the better bargain in the trade it was his good fortune, and the school board is in the position of many good business men who have made bad bargains. It is not the duty of a court of equity to relieve from hard bargains simply because they are such.

For the foregoing reasons, the decree under review will be affirmed.

Affirmed.

SCHMELZ BROS., BANKERS, INC., *v.* QUINN, ET ALS.

(*Staunton, September 21, 1922.*)

1. DEEDS.—Trust—Surety—Fraud—Failure of Creditor to Give Information to Surety—Notice.
2. IDEM.—Trust—Administration by Court—Compensation to Trustee—Code, sec. 6279.

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Appeal from Court of Law and Chancery of city of Roanoke.

Affirmed.

J. Winston Read and *Hart & Hart*, for the appellant.
Jackson & Henson and *Horace M. Fox*, for the appellees.

Kelly, P., absent.

BURKS, J.:

For some time prior to October 31, 1916, the Virginia Metal Culvert Company, Inc., had been engaged in the manufacture and sale of metal culverts. Its sales seem to have been confined principally to the States of Virginia and West Virginia, and its customers to railroad companies, counties, cities and towns. It had secured a line of credit with the appellant, and on October 31, 1916, it was indebted to the appellant in the sum of $15,126. This indebtedness was evidenced by sundry notes of the Culvert Company, with collateral attached. When the Culvert Company desired money it executed its collateral note for the sum desired, payable to the appellant, and attached to it an invoice of goods sold or supposed to have been sold to one of its customers, and a carbon copy of a letter addressed to the purchaser notifying him that the account (invoice) had been assigned to the appellant and requesting that remittance therefor be made to the appellant. These papers were forwarded to the appellant and the note was discounted by it. A few days prior to October 31, 1916, the appellant sent E. S. Blanton, its cashier, to Roanoke where the Culvert Company was located and did business "for the purpose of ascertaining whether the accounts were *bona fide* and unpaid."

All of the stock of the Culvert Company appears to have been owned by two men in equal shares, to-wit: L.

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C. Stewart, who was president and a director of the company, and had charge of its financial affairs, and Marshall A. Quinn, who was vice-president and a director, and who was "foreman of the shops." When Blanton went to Roanoke he employed counsel to represent the appellant. "He was under the impression that his claim or claims were in bad shape. He later went out to the plant of the concern, and upon returning to my office (his counsel's office) he seemed to be in much better humor." He found upon the books of the Culvert Company a considerable number of accounts which were good and which the company was willing to give him as collateral. Stewart, the financial man of the Culvert Company, was out of town when Blanton reached Roanoke and did not return until several days later. On the night of his return, which was Sunday, Blanton, Stewart and Quinn, together with one Flowers, a salesman of the Culvert Company, met at Blanton's room at the Hotel Roanoke to discuss the matter of the indebtedness of the company to the bank. Blanton and Flowers left the conference in order to permit Stewart and Quinn "to thresh the matter out between themselves," and, upon their return, "Blanton was informed that the matter would be taken up with their respective wives relating to some method of meeting the situation." Later that evening, Flowers saw Mrs. Quinn and asked her "if she was going to do anything, and she said absolutely no." This information he communicated to Blanton.

Mrs. Quinn owned a valuable house and lot in the city of Roanoke, but owned no stock in the Culvert Company and had nothing to do with its business. The testimony as to who requested Mrs. Quinn to give a deed of trust on her property to secure the indebtedness of the Culvert Company is very conflicting. Quinn and wife testified that the deed was executed at the instance of Blanton, while Blanton says: "I think Mr. Quinn first went to his wife

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at the request of Mr. Stewart. I am very certain that I never made any such request, either directly or indirectly." When asked on cross-examination if he had not come to Roanoke for the purpose of getting some kind of settlement of his debt, he replied, "No, I came for the purpose of ascertaining whether the accounts were *bona fide* and unpaid."

On the subject of Blanton's knowledge of the attitude of Mrs. Quinn towards the deed of trust and his connection therewith, Blanton testified as follows: "Q. Then who suggested giving this security? A. I think Mr. Stewart first suggested it. Q. You knew he was trying to get the security? A. I knew that he was attempting to get security? Q. Yes. A. I did. Q. You knew that he was attempting to get Mrs. Quinn to join in that deed? A. I knew that he was attempting to get Mr. Quinn to join. Q. Didn't you know that the property was in Mrs. Quinn's name? A. I didn't know it, I was so told. Q. You knew they were trying to get Mr. and Mrs. Quinn to give a deed of trust on their home to secure this debt? A. I knew Mr. Stewart had stated that that was his intention. Q. You knew also before this deed of trust was given, that Mrs. Quinn had at first refused to give any such deed of trust, did you not? A. Not directly—only by hearsay evidence. I didn't know that from Mr. Quinn. Q. Who did you hear it from? A. I think Mr. Flowers told me that. Q. It is a matter of fact that Mr. Flowers went to Mrs. Quinn, at whose suggestion it makes no difference now, but he went to Mrs. Quinn and talked to her about giving this deed of trust, and she refused, did she not, or so Mr. Flowers reported? A. Mr. Flowers reported that Mrs. Quinn had refused to give the deed of trust. Q. And you know that afterwards Mrs. Quinn did give the deed of trust? A. I saw her sign it. Of course. Q. And you knew that in between the time she refused and the time

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she gave it, you had gone over these books in the office of the Metal Culvert Company? A. I had gone over the books presented to me by Mr. Stewart. I did not make an audit of the company in any sense of the word."

Quinn was "foreman of the shops," and had nothing to do with the finances of the company, except occasionally to sign checks for payrolls, and did not know of the status of the accounts of debtors, nor does it appear that he had any knowledge of irregularities in the assignment of accounts by the Culvert Company to the bank. It is certain that Mrs. Quinn had none.

Quinn and his wife testified that after going over the books, Blanton stated that there was upwards of $10,000 of good accounts on the books. Blanton denies having made the statement, but his testimony is not clear and satisfactory. On this subject he testified, among other things, as follows: "Q. Did you have any reason to doubt that those accounts were not good and valid accounts, as the ledger showed them? A. I did not. Q. You have no reason to think that they were paid at that time, had you? A. I had not. Q. And you did believe that they were good solvent accounts? A. Of course I did. Q. You had a reason to tell Mrs. Quinn that they were not good accounts, did you? A. I think I did, because I was to some extent guaranteeing the accounts, and that was not my province to guarantee the accounts. Q. You say in your conversation you said to Mrs. Quinn that the people were solvent, or something of that kind; you mean if the accounts had not been collected the parties themselves were responsible people? A. To the best of my knowledge and belief, they were all responsible people. Q. Did you tell Mrs. Quinn that you were making that qualification? A. I don't remember making either statement, I said awhile ago if I made such a statement I think it must have been on that basis. Q. But what I am asking you is, if you did make

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such a statement, did you tell Mrs. Quinn it was on that basis? A. I probably did. Q. You wont swear to that, will you? A. No, I will not. Q. You say that Mr. Quinn had equal means of knowledge of these accounts that you had, in other words that he saw the ledger? A. He saw the ledger at the same time I did, or before I saw it. Q. And you both thought they were good accounts? A. I thought they were valid accounts undoubtedly."

Under these circumstances, counsel for the appellant, at the instance of Blanton, prepared a deed of trust to be executed by Stewart and wife and Quinn and wife to John M. Hart and James P. Hart, trustees, securing the payment of sundry notes of the Culvert Company to the appellant, amounting to $15,126. This deed bears date October 31, 1916, but there was some delay in its execution, because the beneficiary and its counsel "were waiting on Mrs. Quinn to sign." Mrs. Quinn had positively refused to sign it, and, according to her testimony, never agreed to sign until assured by Blanton that there was at least $10,000 of good collateral for the debt, and that the property of Mrs. Stewart should be first subjected. It was estimated that Mrs. Stewart's property would yield $5,000 for the trust fund, and if this was correct and the $10,000 was applied to the debt the liability on Mrs. Quinn's property would be between $500 and $600. The deed conveyed, amongst other things, the house and lot of Mrs. Quinn in which she resided, in the city of Roanoke, Virginia, for the purposes of the trust. The deed of trust contains the following, amongst other provisions: "It is understood that certain collateral of the Virginia Metal Culvert Company, Inc., aggregating the sum of $10,288.40 has heretofore been placed with Schmelz Bros., Bankers, to secure the payment of the thirty-one (31) notes first mentioned * * * which collateral shall be held and collected by Schmelz Bros., bankers, primarily for its own benefit until

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its entire debt is paid." "It is understood and agreed that the said Schmelz Bros., Bankers, Inc., shall, as far as possible, collect the collateral in their hands and that any amount collected by them shall be applied to the payment of the debt secured before either of the real properties conveyed, shall be subjected to the lien of this deed of trust. * *

"It is further understood and agreed that in the event it becomes necessary to foreclose this deed of trust, that the property of Alice E. Stewart, subject to the mortgage, as aforesaid, shall be first subjected and that the property of Mary E. Quinn shall be subjected only in the event that the proceeds derived from this property, and the collateral, so far as available, are insufficient to pay off and liquidate the debt secured in full. * * *

"In the event that default shall be made in the payment of the notes secured, the beneficiary, so far as possible, shall exhaust the collateral securities now in its hands, or hereafter placed in its hands under the terms of this deed, but it shall not be compelled to bring any suit or action upon any such collateral to collect the same."

We do not doubt that Blanton acted in good faith in the matter of getting the deed of trust, and that he honestly believed that the Culvert Company held, as shown by its books, good and solvent accounts amounting to upwards of $10,000. There was no doubt as to the solvency of the debtors, if the debts ever actually existed and had not been paid. The question is, what, if any, representation did Blanton make as to the collateral? Blanton, of course, was anxious to have Mrs. Quinn sign the deed of trust. This she had positively refused to do. Quinn and wife testify that she continued to refuse until Blanton represented that there were good and solvent collaterals which were to be first applied, amounting to upwards of $10,000. Blanton's testimony on the subject is far from satisfac-

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tory. While at times denying that he represented the facts to be as stated by Quinn and wife, at others he makes such statements as these: "I probably expressed the opinion that they were collectible accounts, if valid." "What did you tell Mrs. Quinn that day? A. I presume that all the accounts were collectible, if valid." "Q. That is the language you used? A. I don't know if that is the language I used or not." Again, "Q. Did you tell Mrs. Quinn that you were making that qualification? A. I don't remember making either statement. I said awhile ago if I made such statement it must have been on that basis. Q. But what I am asking you is, if you did make such a statement, did you tell Mrs. Quinn it was on that basis? A. I probably did. Q. You wont swear to that will you? A. No, I will not." In addition to this, the deed of trust itself, which was prepared by counsel for the appellant, asserts in one of the paragraphs hereinbefore quoted the existence of "certain collateral of the Virginia Metal Culvert Company, Inc., aggregating the sum of $10,288.40," which is to be collected and applied towards the payment of the debt secured. This was, of itself, a representation by the appellant of the existence of such collateral, which representation was untrue. At that time $2,000 of this collateral had been paid, and upwards of $5,000 of it was bogus, or had no existence. Upon this and other evidence in the cause, the trial court held that there was a positive representation to Mrs. Quinn by appellant that there were $10,000 of good accounts which were primarily liable for the payment of the debt secured, and that representation was untrue. In this conclusion we concur.

As said in *Guarantee Co.* v. *National Bank*, 95 Va. 481, 491, "If a party innocently misrepresents a material fact by mistake, the effect is the same on the other party who is misled by it as if he who innocently made the misrepresentation knew it to be positively false. The real question in

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such a case is not what the party making the representation knew or believed, but was the representation false, and the other party misled by it. *Lynch. Fire Ins. Co.* v. *West*, 76 Va. 575; *Grim* v. *Byrd*, 32 Gratt. (73 Va.) 293; *Max Meadows L. & I. Co.* v. *Brady*, 92 Va. 77; and *Wilson* v. *Carpenter*, 91 Va. 183."

Furthermore, Blanton admitted that the alleged debtors were solvent, and that there was no reason why the debts could not be made, "if valid." He reiterates in his testimony the statement that the debts were good, "if valid," and that he could only take the word of Stewart and Quinn for the validity of the debts, but does not state why he always added the qualification, "if valid." This, however, is explained by the witness Flowers, introduced on behalf of the appellant. Flowers was asked, "What do you mean by saying that he could only take their word for it that they were good?" To which he replied, "His position was that he had with him at the time $15,000 worth of accounts that were presumed and proven not to be good and the consequence was, as I understood, that the presumption was that the other $10,000 that were claimed to be good might be in the same condition." How long the Culvert Company had been borrowing from the appellant does not appear, but it does appear that during these dealings it had assigned to appellant a large amount of accounts that were not valid. The invalidity was not on account of the insolvency of the debtors, but for other reasons. Hence, the purpose of the visit of Blanton to Roanoke was not to enquire into the solvency of the debtors to the Culvert Company, about which no question was raised, but to ascertain "whether the accounts were *bona fide* and unpaid." When he first went to Roanoke, and before he had gotten any additional security for the claims of the appellant, "he was under the impression that his claim or claims were in bad shape." He knew that his principal then held a

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large amount of collateral of the Culvert Company which the latter had collected, or which for some reason was invalid, and that the Culvert Company had not dealt squarely with the appellant. None of these matters was disclosed to Mrs. Quinn before the deed of October 31, 1916, was executed and delivered, whereby her property was made liable for the debts of the Culvert Company. Notwithstanding Blanton's denial that he ever, directly or indirectly, requested Mrs. Quinn to execute the deed of trust, and that he "was very careful not to make any such suggestion," the fact remains that the deed of trust was prepared by counsel for the appellant, was tendered to Mrs. Quinn for her signature, and was signed and acknowledged by her in the office of said counsel, without any disclosure to her of the prior misconduct of the Culvert Company in the matter of the assignment to the appellant of the invalid accounts. Mrs. Quinn had no knowledge of this misconduct or that there was any question as to the validity of the collateral to be assigned. Her property was being taken as security for the debt of the Culvert Company for which she was in no way bound, and the failure of the appellant to disclose the facts above mentioned was a fraud upon her rights. *Guarantee Co. v. National Bank,* 95 Va. 480, was an action upon the bond of Hamner, teller of the bank, to recover for his defalcation. The Guarantee Company, which was surety on Hamner's bond, filed a special plea in which it was alleged "that the Guarantee Company was induced to execute as surety the bond of Hamner as teller of the bank by the positive representation in writing made to it for and on behalf of the bank by its cashier, that Hamner was never in arrears or default to the bank; that his books and accounts, including cash, securities and vouchers, were last examined in December, 1893, by a committee of the board of directors of the bank and found to be correct;

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and that but for this representation it would not have executed the bond. It then avers that these representations were false; that Hamner was at the time of these representations, and had been long prior thereto, a defaulter and largely in arrears to the bank; and that the examination of his books and accounts, including cash, securities and vouchers, which was reputed to have been made in December, 1893, was not so made; and that if it had been made his defalcation would have been discovered.

This plea was held to be good. The plea alleged that the examination of the books and accounts of Hamner which was represented to have been made in December, 1893, was not so made. The same result would have followed if the allegation had been that the examination was so carelessly and negligently made as to fail to disclose the defalcation which in fact existed and was disclosed by said books and accounts. See also Childs on Suretyship & Guaranty, sec. 54.

In *Hudson* v. *Miles*, 185 Mass. 582, 71 N. E. 63, 102 Am. St. Rep. 373, it is said: "It may be taken to be settled that if it is known to the obligee of a bond that the principal in the past has been guilty of irregularities in respect to the duties for the faithful performance of which in the future the bond is given, the failure of such an obligee to disclose that fact is a defense to the liability of such an surety; *Phillips* v. *Foxall*, L. R. 7 Q. B. 666; *Sooy* v. *State*, 39 N. J. L. 135. The ground of this defense in some cases has been stated to be that fraud is made out (*Lee* v. *Jones*, 17 Com. B. N. S. 482, 507), and in other cases that there is a concealment of facts which the surety has a right to know: *Railton* v. *Mathews*, 10 Clark & F. 954, 943."

The principle announced in these cases, when applied to the facts of the case in judgment, required the appellant to notify Mrs. Quinn of the irregularities of the Culvert

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Company in appellant's previous dealings with that company, or at least to notify her of the doubt and uncertainty as to the existence and validity of the collateral referred to in the deed as first liable for the payment of the debt secured. To the extent of the value of the property conveyed, she stood in the relation of surety for the Culvert Company, and was entitled to this information, and the failure to give it entitled her to relief, at least to the extent of placing her in the same position as if there had been $10,000 of good solvent collateral transferred by the deed.

We are further of the opinion that the appellant was negligent in failing to look after the collection of the collateral deposited with it by the Culvert Company. It was primarily its duty to promptly notify each of the debtors of the assignment to it of his account. The appellant admits this, but seeks to excuse itself on the ground that immediately after the deed was executed, and while the grantors were still present at the place of execution, it was agreed by all the parties, including Mrs. Quinn, that the notices should be sent out from the office of the Culvert Company by Stewart and Quinn, or one of them. There were present at that time, the grantors in the deed, to-wit: Stewart and his wife and Quinn and his wife, and also Blanton, the agent of the appellant, and John M. Hart, his counsel. Stewart, Blanton and Hart all testify to the agreement as to the notice. Quinn's testimony on the subject is unsatisfactory, but in it he makes admissions that tend to show that he also assented to the arrangement. Mrs. Quinn denied being present when any such arrangement was made, or assenting to the arrangement, and Mrs. Stewart testified that she "did not pay any attention to the conversation," and hence did not recollect what transpired about the notice. Hart testified that the conversation about the notice took place "just as they were going out of the room" after the deed was executed, but

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that all of the parties were still present, within a few feet of each other,, and that there could be no doubt about the fact that all of them heard the conversation and agreement. It is manifest, however, even conceding that Mrs. Quinn was still present, that neither she nor Mrs. Stewart had any idea that they were agreeing to anything that affected their rights or liabilities. Mrs. Quinn denies ever agreeing that Stewart or Quinn should give the notices, or ever acquiescing in such an agreement, and had no recollection of any statement made about giving the notices. The conversation on the subject of the notices made so little impression on Mrs. Stewart that she paid no attention to it. It may be well doubted if they would have understood the effect of the agreement between the parties who were talking, if they had hard it, and Mr. Hart, counsel for the appellant, states on cross-examination, that he did not explain it to them. It is a fact of such common knowledge that we cannot shut our eyes to it, that the average woman without any business training, or knowledge of business affairs, would not understand the legal effect of such a conversation as here detailed, and that a great majority of our women are of that class. As a rule, they know little of business affairs and the manner in which they are conducted. If Mrs. Quinn heard the conversation about giving notice, and her failure to speak was from ignorance of her legal rights and duties in the premises, she would not be estopped from setting up the duty of the appellant to give notice of the assignments. *Davis* v. *Owen*, 107 Va. 283, 58 S. E. 581; *Mullins* v. *Shrewsbury*, 60 W. Va. 694, 55 S. E. 736. The trial court saw the witnesses and heard them testify, and gave credit to Mrs. Quinn, and we are unable to say that it committed any error in this respect.

In addition to this, the record fails to disclose that the appellant took any steps whatever to collect the collateral, or made any enquiries about it, or any complaint or any report to the Culvert Company, or Stewart, or Quinn, or

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their wives, on the subject. As a matter of fact $2,000 of it had been collected before the assignment and $5,346 of it was paid to the Culvert Company after the assignment. The record does not disclose when the various items of the collateral fell due, but the dates of the payments to the Culvert Company would indicate that they began falling due within three weeks after the assignment. The appellant knew that it was not getting the money, and that if the collateral was paid, it must have been to the Culvert Company, and yet made no demand on the Culvert Company for it, entered no protest against its collections and gave no notice to other debtors of its assignment, but so far as disclosed by the record sat still and did nothing. This was greatly to the detriment of Mrs. Quinn, the complainant in the court below.

The record does not clearly and distinctly show the dealings of the parties, but the stipulation of counsel printed in the record takes a single item of the collaterals that were assigned as typical, and shows how it was dealt with. The Chesapeake and Ohio Railway Company was indebted to the Culvert Company in the sum of $1,147 for an invoice dated July 27, 1916. On August 10, 1916, the Culvert Company executed to the appellant its collateral note for $918, payable on demand, and attached the invoice as collateral, and also a carbon copy of a letter to the purchasing agent of the railway company, dated August 9, 1916, as follows, to-wit:

"Dear Sir:

"Referring to our invoice of July 27th, amounting to $1,147.50, beg to advise that we have assigned this account to Schmelz Brothers Bankers, Inc., Newport News, Virginia, and will request that in remitting for the amount you kindly forward check to them.

"Very truly yours,

"VIRGINIA METAL CULVERT CO., Inc.

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The stipulation of counsel states that a similar letter was filed with each note and invoice, bearing the same date as the note to which the collateral was attached.

It will be observed that the date of the maturity of the invoice is not given, but it appears from the testimony that this item of $1,147 was paid to the Culvert Company November 18, 1916. There runs through the record an intimation, which apparently is not controverted by the appellee, that the notices of assignment of which carbon copies were furnished the appellant, were never given to the debtors in the invoices, but we have been unable to find any testimony in the record in support of the intimation. On the contrary, Stewart, the president of the Culvert Company, testified as follows: "Q. Were the letters, a copy of which is filed with each exhibit, written to the parties addressed? A. I would assume so; as the copy seems to be here, although I did not do it personally." If such letters were in fact received by the parties, that was sufficient to bind them and no further notice of the assignment was necessary. But however this may be, the negligence of the appellant in regard to the collection of the collateral, as pointed out above, was such as to relieve Mrs. Quinn from any liability for the $10,000 of collateral represented to be good.

The deed of trust in controversy provided for a commission of five *per cent.* to the trustee, in case of a sale under the deed. The trial court allowed only the commission prescribed by the statute for judicial sales. Code sec. 6279. This is assigned as error. The ruling is in favor of the appellant and it has no just ground of complaint, but it is said to be a question upon which the trial courts are not in harmony, and counsel on both sides have asked the ruling of this court on the subject. Such ruling is possibly warranted by the late act of Assembly on the subject of declaratory judgments. Acts 1922, ch. 517, p.

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902. The commission provided by the deed was intended to compensate the trustees for services to be rendered by them as such and for the risk to be incurred in administering the trust. If no services were rendered and no risk were incurred by them as trustees, they were not entitled to the compensation provided by the deed. The court undertook by its decree to administer the trust created by the deed. It directed the land of Mrs. Stewart, one of the grantors in the deed, to be sold, and that the sale should be made by John M. Hart and James P. Hart, trustees in the deed, "and as commissioners of this court in this cause." They were required to give bond and to "make report of their proceedings had hereunder to this court." They made the sale, and subsequently, as "trustees and special commissioners" reported it to the court, and the court "ratified and confirmed" the sale. This was a judicial sale and the trial court committed no error in fixing the compensation of the "trustees and commissioners" in accordance with section 6279 of the Code. The proceedings adopted relieved them of the duties and responsibilities of trustees, which was the foundation for the compensation provided by the deed of trust.

We find no error in the decree of the Court of Law and Chancery, and it is accordingly affirmed.

Affirmed.

EASTERN COAL & EXPORT CORPORATION v. NORFOLK & WESTERN RAILWAY COMPANY.

(*Staunton, September 21, 1922.*)

1. ACTIONS.—Conversion of Coal—Measure of Damages—Carriers—Instructions—Fair Market Value—Appeal and Error—Rule of Decision—Code, sec. 6363—Cross Error—Rule VIII—Moot Questions.

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Error to Corporation Court of city of Roanoke.

Affirmed.

S. S. P. Patteson and *E. W. Poindexter*, for the plaintiff in error.

S. K. Funkhouser and *Waller R. Staples*, for the defendant in error.

PRENTIS, J.:

The Eastern Coal and Export Corporation, plaintiff, complain of the inadequacy of the damages awarded it against the Norfolk and Western Railway Company, defendant, upon a motion to recover for the value of 688.75 tons of coal in transit, confiscated by the defendant for its own use as fuel.

The defendant admitted its liability and paid the plaintiff $4,132.50, or at the rate of $6.00 per ton therefor. The plaintiff, claiming that this amount is grossly inadequate, sought in this proceeding to recover the additional sum of $7,209.42, or $10.50 per ton as the fair measure of the damages.

After a jury trial there was a verdict for $1,377.50, which is equal to $2.00 per ton, showing that the jury valued the coal in transit at $8.00 per ton. Judgment upon the verdict followed, and the plaintiff is here assigning numerous errors.

These additional and pertinent facts appear: The plaintiff was a member of the Lambert's Point Coal Exchange, an association of large shippers of coal. For the convenience and advantage of all interested, as well as for the purpose of avoiding demurrage charges and of securing expedition in loading and dispatch in the clearing of vessels, there was a commingling of ownership at the Lambert's Point piers of the railway company. All coal belonging to members of the exchange was classified so that coal of the same quality was there pooled, and each shipper credited with

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the quantity of his coal contributed to such pool. When a member delivered coal to the railway company for transportation, this fact was telegraphed to the exchange and such shipper was promptly credited with the quantity of coal thus in transit, and could thereupon withdraw from the pool an equivalent quantity of coal and deliver it to a vessel for his customer. Even though such member had no coal then actually in the pool, he could in anticipation of the arrival of his coal and for the performance of his contracts withdraw from the pool the quantity of coal with which he then stood credited. For the coal here involved the plaintiff had received such a credit and could have withdrawn an equivalent quantity from the pool before it was confiscated by the defendant. The necessity to continue the operation of the railway is given by the company as the reason for such confiscation. This necessity was created because those under contract obligations to supply such fuel failed to do so; such failure being due to a labor strike at the mines which were the source of supply.

The case appears to have been tried and is presented here upon two different if not inconsistent theories—one that the plaintiff is entitled to recover damages equal to the amount which it claims would have been realized from an alleged sale of the coal at its destination, and the other that the fair market value of the coal at Lambert's Point, its destination, is the proper measure of the recovery. The evidence offered in support of the plaintiff's claim tends to show that the market value and the contract price substantially correspond. The true measure of the recovery in this case, then, is the question presented.

While the usual rule in cases of conversion of goods is that the measure of the recovery is their value at the time and place of conversion, the general rule when property is delivered to a carrier for transportation and is by the carrier converted, the measure of the recovery is the fair

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market value of the property at its destination, less the cost of transportation and expenses of sale there. *C. & O. Ry. Co.* v. *Stock,* 104 Va. 104, 51 S. E. 161.

The language of Knapp, Circuit Judge, in *Norfolk & Western Railway Co.* v. *Fort Dearborn Coal & Export Co.*, 280 Fed. 266, is appropriate here: "Plaintiff is of course entitled to be made whole, not as against an improvident purchase or a falling market, but for the actual loss it suffered by defendant's appropriation of its coal. On the offers and avowals of defendant it must be assumed, as plaintiff's president testified, that the coal sued for, if it had not been taken, would have gone into certain pools at Lambert's Point; that plaintiff had no right of diversion 'to any other place or purpose;' that after passing the scales at Bluefield this coal in transit would have had practically the same status as though delivered at the pools; that its identity would then have been lost and plaintiff entitled merely to a credit in the designated pools for the same number of tons of coal of corresponding grade. This being so, it seems plain that plaintiff's actual loss was the market value of the credit which it would have received if its coal had not been confiscated; and that market value, presumably capable of ascertainment, measures the damages which plaintiff may rightfully recover. *Chicago, M. and St. P. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 40 Sup. Ct. 504, 64 L. Ed. 801."

The judgment in that case was reversed because it had been tried upon the erroneous theory that the true measure of the recovery was the price paid for the coal by the plaintiff instead of its fair market value when confiscated.

This is said in *Wallingford* v. *Kaiser,* 191 N. Y. 392, 84 N. E. 295, 15 L. R. A. (N. S.) 1126, 123 Am. St. Rep. 602: "A second class of cases, constituting an exception to the rule that the value of the converted article at the place of conversion is ordinarily the true measure of damages, are

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actions against common carriers, where the goods are lost, destroyed or damaged in transit, in which the damages recoverable against the carrier are based on the market value at the point of destination. 2 Sedgwick on Damages, (8th ed.), sec. 844; Mayne on Damages, 285; *Sturgess* v. *Bissell*, 46 N. Y. 462; *Holden* v. *New York C. R. R. Co.*, 54 N. Y. 662."

In *Roth Coal Co.* v. *Louisville & Nashville R. Co.*, 142 Tenn. 52, 215 S. W. 404, there is this clear and succinct statement of the rule: "Ordinarily the market value at the time and place of conversion is the rule. There is an exception, however, where the property is converted by a common carrier with which it has been entrusted for transportation, in which case the rule supported by a great weight of authority is that the market value at the point of destination, less the costs of transportation, governs." The expense of the vendor in marketing at destination should also be deducted from the market value there.

The plaintiff offered two instructions presenting alternative views. The court refused to grant an instruction based upon the claim that the measure of the recovery here is the difference between the amount already paid by the defendant ($6 per ton) and the amount at which the plaintiff claimed to have already sold the coal. This action of the trial court can be justified for several reasons: (a) Because it was inconsistent with another instruction which was offered by the plaintiff at the same time and granted by the court, that the measure of the recovery is "the market value of the coal at the agreed point of destination, namely, Lambert's Point, Va., less any sum that may have been paid on account," &c. (b) There was no sufficient evidence of any enforceable contract for the sale of the confiscated coal, no evidence of any pecuniary loss to the plaintiff growing out of such alleged contract, nor of any demand of compliance therewith by such alleged purchaser,

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nor of any failure of the plaintiff to comply therewith. (c) Because the instruction which was granted at the instance of the plaintiff sufficiency states the proper rule to be here applied. The fair market value at destination, less the cost of transportation and marketing there, is the true measure of damages to be applied under the evidence in this case. The practical difficulty of its application here arises out of the fact that at the time of the confiscation there was an embargo on the transportation of coal enforced by the Interstate Commerce Commission, except for coal intended for trans-shipment at tidewater to New England or other coastwise destinations, or to foreign countries. Special permits were required even for such shipments. The coal which was confiscated was moving under such a permit, ostensibly for trans-shipment to Stockholm, Sweden, although the plaintiff previously had in the pool more than enough coal to fill this contract, and the vessel chartered to carry it had already been loaded and despatched.

The market for coal was in a chaotic condition, making it difficult to show such market value. The testimony was conflicting as to this, so that the verdict of the jury is controlling. It is supported sufficiently by evidence introduced by the defendant showing that a very large number of other owners of coal which was also confiscated by the defendant at or near the same time voluntarily rendered their bills therefor at $6 per ton and less, while for only a very small part of it, say 13 per cent, the voluntary charge exceeded that price. Most significant is the fact that just before this controversy arose, that is on July 8, 1920, it became necessary to estimate the value of coal in pools at Hampton Roads (Lambert's Point), New York, Philadelphia and Baltimore, because of the necessity for terminating the affairs of the Tidewater Coal Exchange, which had ceased active operations April 30 preceding. For the ad-

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justment of credits between its members, the coal then in these pools at tidewater terminals to their credit was estimated as worth around ten dollars per ton. Assuming that to be a fair market value of such coal at destination, and bearing in mind that if the coal here involved had been carried to destination it would have been subject to a freight charge of $2.00 per ton, the value assessed by the jury, $8.00 per ton, in transit, appears to be justified.

Fair market value is neither the highest nor the lowest possible price at which a commodity under exceptionable conditions may be sold, for neither a forced sale nor a compulsory purchase affords the true test of such value. Fair market value is the price which would be agreed upon at a given time between a willing seller and a willing buyer in consummating a voluntary transaction. The question of fact here involved is complicated by peculiar conditions as well as by conflicting testimony. When this is true and the trial court has refused to set aside the verdict, we must do so, except when the judgment is "plainly wrong or without evidence to support it." Code, sec. 6363. Our conclusion, then, is to affirm the judgment.

Other interesting questions are discussed in the briefs, but as nothing is suggested which should change the result, it would be unprofitable further to pursue the discussion.

It is also unnecessary to rule upon any of the cross-errors assigned by the defendants under rule VIII. This rule, under which such assignments are here permitted, is designed for the correction of errors against the defendant in error (or appellee) when some affirmative relief is sought here by way of reversal, modification or correction of the judgment under review. As the defendant has made no motion for a new trial and seeks no relief here, therefore these assignments present moot questions, which however interesting are academic. *Singer Mfg. Co.* v. *Bryant*, 105 Va. 428, 54 S. E. 320.

Affirmed.

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